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APPENDIX.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1972.
CERTIORARI GRANTED FEBRUARY 26, 1973.

INDEX TO APPENDIX

	Page
Exhibit 1(f). Backpay Specification and Notice of Hearing	1
Exhibit 1(i). Answer of Respondent to Backpay Specification	7
Exhibit 1(k). Order Rescheduling Hearing	13
Exhibit 1(m). Supplemental Backpay Specification and Notice of Hearing	14
Appendix A. Computation of Quarterly Commissions Due Kenneth L. Baker for Period August 24, 1963, Through September 30, 1964	23
Appendix B. Quarterly Gross Backpay Prior to Creation of Distributorships	24
Appendix C-1. Computation of Baker's Gross Backpay From October 1, 1964 through December 31, 1968	25
Appendix C-2. Computation of Baker's Estimated Gross Backpay From January 1, 1969 Through June 30, 1969	26
Appendix D. Baker's Net Interim Earnings	27
Appendix E-1. Baker's Net Backpay Through December 30, 1968	34
Appendix E-2. Baker's Estimated Backpay From January 1, 1969 Through June 30, 1969	35
Exhibit 1(o). Motion to Amend Case Caption	36
Exhibit 1(t). Answer of Respondents to Supplemental Back Pay Specification	38
Exhibit A. Computation of Commissions	47
Exhibit B. Quarterly Gross Backpay Computation	50

Page

Exhibit C. Baker's Probable Case Sales 51

Exhibit D. Average Net Profit Per Case Top Five Distributors 53

Exhibit E. Baker's Estimated Earnings as a Distributor 54

Supplemental Decision and Order 56

Exhibit 15(a). Agreement Made January 31, 1968 60

Exhibit 15B. Instrument of Transfer and Assignment and Assumption of Liabilities 73

Schedule X. (Bill of Sale) 80

Respondent's Exhibit 4. Consent to the Assignment of the Agreements 81

Exhibit 19. Letter Dated November 14, 1968 to William B. Luck, Esq. 82

Substitution of Attorneys 84

Exhibit 16A. Letter Dated November 18, 1969 to Mr. Gene G. Schilling, President 85

Exhibit 16B. Letter Dated November 28, 1969 to Mr. Douglas H. Barton 87

Exhibit 20. Letter Dated December 9, 1968 to Golden State Bottling Co., Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento 89

Petitioners Exhibit 1. Letter Dated December 11, 1968 to Mr. Kenneth L. Baker 91

Exhibit 21A. Certificate of Posting 92

Exhibit 21B. Notice to All Employees 93

Page

Petitioners' Exhibit 18A. Letter Dated January 22, 1969 to Mr. M. G. Dempster 96

Exhibit 2. Appendix B—Quarterly Gross Backpay Prior to Creation of Distributorships 98

Exhibit 3. Appendix C-1—Computation of Baker's Gross Backpay From October 1, 1964 Through December 31, 1968 99

Exhibit 24. Appendix C-2—Computation of Baker's Estimated Gross Backpay From January 1, 1969 Through June 30, 1969 100

Exhibit 4. Appendix E-1—Baker's Net Backpay Through December 30, 1968 101

Exhibit 25. Appendix E-2—Baker's Estimated Backpay From January 1, 1969 Through June 30, 1969 102

Exhibit 5. Total Case Sales of Each Driver-Salesman—July 1962 Through August 1963.

Exhibit 18B. Pepsi Cola Bottling Co. of Sacramento Commissions From 4th Quarter 1962 to End of 1968.

Pertinent Testimony Involved 103

Testimony of Edwin John Crofoot 105

Testimony of Eugene Schilling 131

Testimony of Leonard Willeford 204

Testimony of Donald Mraule 212

Testimony of Myrl McHann 217

Testimony of Kenneth Baker 222

Testimony of Eugene Schilling 236

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX

EXHIBIT 1(f).

Backpay Specification and Notice of Hearing.

United States of America, Before the National Labor Relations Board.

Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento and Edward J. Farrell, An Individual and P.C.B.C.E. Inc., Party to the Contract. Case No. 20-CA-2656.

The National Labor Relations Board, having on June 10, 1964, issued an order directing Respondent, Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento, to make whole discriminatee Kenneth L. Baker for his losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, the United States Court of Appeals for the Ninth Circuit having on November 27, 1968, entered its Decree enforcing in full the backpay provisions of the Board's Order herein, and controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director of the National Labor Relations Board for the Twentieth Region, pursuant to authority duly conferred upon him by the Board, hereby issues this Backpay Specification and alleges as follows:

1.

The backpay period for Baker begins on August 24, 1963,[1] and continues to run.[2]

---

[1]Baker was terminated on August 16, 1963, but was given one week of vacation pay.

[2]Respondent has not yet offered to reinstate Baker to employment which is substantially equivalent to what he would have had, if he had not been discharged.

2.

An appropriate measure of the gross backpay Baker would have earned from August 24, 1963 through September 30, 1964[3] is the total of the base pay which Respondent paid its driver-salesmen during the period, plus the commissions which Baker might reasonably have earned during that period, plus the Christmas bonus he would have received in December, 1963 plus the value of uniforms which Respondent supplied its driver-salesmen.

(a) From August, 1963 through March 31, 1964, the base pay for driver-salesmen employed by Respondent was $118 per week.

(b) From April 1, 1964 through September 30, 1964, the base pay for driver-salesmen employed by Respondent was $123 per week.

(c) An appropriate measure of the commissions which Baker would have received from sales in each quarter for the period from August 24, 1963 through September 30, 1964, is derived by dividing the commissions which Baker received in the fourth quarter of 1962 and in the first quarter of 1963 by the average total commissions, for the same period, earned by all the driver-salesmen who worked throughout both of those quarters, and then multiplying the quotient resulting from such computation by the average total commissions earned by the driver-salesmen employed by Respondent for each calendar quarter in the period from August 24, 1963 through September 30, 1964. These computations are set forth in attached Appendix A, which is made a part hereof.

---

[3]After September 30, 1964, Baker would have been compensated as a distributor on a straight commission basis. Computations for the backpay period subsequent to September 30, 1964 are set forth in paragraph 5 below and Appendix C.

(d) Baker would have received from Respondent in December, 1963 a Christmas bonus totalling $45.00.

(e) The uniforms which Respondent furnished its driver-salesmen had a fair market value of $8 per quarter.

3.

The gross backpay which Baker would have received each calendar quarter from August 24, 1963 through September 30, 1964 is set forth in Appendix B, which is made a part hereof.

4.

It is reasonable to assume that, absent the unlawful discrimination against Baker, prior to October 1, 1964, Respondent would have offered Baker a distributorship under which he would have been converted from the status of driver-salesman and compensated solely by receipt of a percentage of sales made and that Baker would have accepted this offer effective October 1, 1964.

5.

(a) An appropriate measure of Baker's gross backpay for the period beginning October 1, 1964 and continuing to date is the total of the commissions he would have received as a distributor.

(b) An appropriate measure of the commissions Baker would have received as a distributor is the net earnings received from commissions during the same period by Respondent's distributor Donald Thorne who, at all times material herein, has been comparable to Baker in on-the-job skills and performance.

(c) An appropriate means of determining Thorne's earnings for each quarter through calendar year 1968[4] is to multiply his net total commissions in each calendar year by the quotient obtained when the number of cases of beverage sold by Thorne in each quarter of such year is divided by the total number of cases of beverage he sold in that year.

(d) An appropriate means of estimating Thorne's earnings for each quarter of 1969 is to add Thorne's earnings for the same quarter in each of the preceding years and to divide the sum of these earnings by the number of quarters added.

(e) The computations of net commissions which Baker would have earned for each quarter from October 1, 1964 through June 30, 1969[5] are set forth in attached Appendices C-1 and C-2, which are made a part hereof.

6.

(a) It is admitted that Baker made interim earnings during the backpay period in the amounts set forth in attached Appendix D, which is made a part hereof.

(b) Baker incurred deductible expenses in each quarter of the backpay period in the amounts set forth in attached Appendix D.

(c) Net interim earnings is the difference between interim earnings and deductible expenses as set forth in Appendix D.

---

[4]Thorne's net commissions are only available on a calendar year basis and therefore precise determination of Baker's gross backpay cannot be made subsequent to December 31, 1968. An appropriate means of estimating backpay after December 31, 1968 is alleged in paragraph 5(d).

[5]The backpay period continues to run as alleged in paragraph 1 above but for the purpose of this Specification calculations have been cut off at June 30, 1969.

7.

(a) Baker's net backpay through December 30, 1968 is set forth in Appendix E-1, which is made a part hereof.

(b) Baker's estimated net backpay from January 1, 1969 through June 30, 1969 is set forth in Appendix E-2, which is made a part hereof.

8.

(a) Baker's total net backpay through December 31, 1968 and before applicable tax deductions amounts to $17,148.

(b) Baker's total estimated net backpay from January 1, 1969 through June 30, 1969 amounts to $390.

(c) Baker's backpay continues to run and will continue to run until such time as Respondent offers Baker employment which is substantially equivalent to what he would have had, if he had not been discharged.

Summarizing the facts and calculations specified above, the obligation of Respondent to make whole Baker under the Board Order and the Court Decree will be discharged by payment to Baker of $17,148, plus the total additional net backpay which has accrued since December 31, 1968 and will accrue until Respondent offers Baker reinstatement in accordance with said Order and Decree, plus interest accrued at the rate of six percent (6%) per annum on all unpaid balances of backpay computed for each calendar quarter from the first day of the ensuing quarter until paid in full pursuant to said Order and Decree, minus the tax withholdings required by Federal and State Laws.

PLEASE TAKE NOTICE that on the 16th day of December 1969, at ten o'clock in the forenoon, Pacific Standard Time, in Courtroom No. 2, (Room

2407), Federal District Court, Federal Building, 650 Capitol Mall, Sacramento, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Backpay Specification, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to the Backpay Specification within fifteen (15) days from the service hereof. To the extent that such Answer fails to deny allegations of the Backpay Specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true, and the Respondent shall be precluded from introducing any evidence controverting them.

DATED AT San Francisco, California, this 30th day of September, 1969.

/s/ Roy O. Hoffman
Roy O. Hoffman, Regional Director
National Labor Relations Board
Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

EXHIBIT 1(i).

Answer of Respondent to Backpay Specification.

[Title Omitted in Printing]

COMES NOW, GOLDEN STATE BOTTLING COMPANY, INC. d/b/a PEPSI-COLA BOTTLING COMPANY of Sacramento, Respondent above named, and, for its answer to the Backpay Specification filed herein, admits, alleges and denies as follows:

I.

In answer to the allegations of paragraph 1 thereof, Respondent admits that the backpay period for Baker begins on 24 August, 1963, but denies that said period continues to run, in that:

(a) Respondent, contrary to the Regional Director's assertion, did, on 11 December, 1968, offer to reinstate Baker to employment substantially equivalent to that which he would have had if he had not been terminated and, further,

(b) The Regional Director, by his acts and conduct in the premises is estopped from asserting that Respondent has failed to offer Baker reinstatement to employment which is substantially equivalent to that which he would have had if he had not been terminated, and, further,

(c) To require Respondent to offer to Baker reinstatement to a position in accordance with the Regional Director's contentions (i.e., to an independent distributorship) would be to deprive Respondent of property without due process of law in that the same would force Respondent to admit and acknowledge the validity of the Regional Director's principal contention herein, a contention which is disputed and denied by Respond-

ent, and, in consequence, to admit and acknowledge a liability and responsibility on the part of Respondent which Respondent disputes and denies.

II.

In answer to paragraph 2 thereof, Respondent denies that subsequent to 30 September, 1964, Baker would have been compensated either as a distributor or on a straight commission basis and, therefore, alleges that the appropriate period for the purposes of this paragraph is and should be 24 August, 1963 through 11 December, 1968. Further answering the allegations of said paragraph 2, Respondent denies all and singular, generally and specifically each and every allegation of sub-paragraph (c) thereof, and, in this connection, alleges that the appropriate method for determining the commissions Baker might reasonably have been expected to earn during the period 24 August, 1963 through 11 December, 1968, is, first, to determine the ratio of Baker's case sales to the mean case sales of all full-time driver salesmen on a monthly basis for each of the 14 months of Baker's employment by Respondent and, second, by dividing the sum of said ratios by 14, determine the average ratio of Baker's case sales to the mean case sales of all full-time driver salesmen expressed as a percentage and, third, to apply said percentage to the average commission earnings of the full-time driver salesmen employed by Respondent during the period under review in order to determine the commissions which Baker, with reasonable probability, would have earned during the same period. These computations are set forth in Exhibit "A" attached hereto, and, by this reference, made a part hereof. Respondent admits the remaining allegations of said paragraph 2, to the extent that the same are not denied, or otherwise modified or affected by the foregoing.

III.

In answer to paragraph 3 thereof, Respondent denies all and singular, generally and specifically, each and every allegation thereof, and, in this connection, alleges that the period specified and amounts set forth are inappropriate and incorrect for the reasons hereinabove set forth, and further alleges that the gross pay which Baker might reasonably have been expected to earn during the period 24 August, 1963 through 11 December, 1968 is that set forth in Exhibit "B" attached hereto and, by this reference, made a part hereof.

IV.

In answer to paragraph 4 thereof, Respondent denies, all and singular, generally and specifically, each and every allegation thereof, and every matter, fact and thing therein contained, and, in this connection, specifically denies:

(a) That Baker would have been offered a distributorship by Respondent, or

(b) That independent distributors under contract to Respondent are or ever have been paid compensation by Respondent or that such distributors are, in fact, "compensated solely by receipt of a percentage of sales made", or

(c) That Respondent, in any event, can lawfully be held liable to Baker for any amounts which Baker might have earned as an independent distributor.

V.

In answer to paragraph 5 thereof, Respondent denies all and singular, generally and specifically, each and every allegation thereof, and every matter, fact and thing therein contained. Further answering the allegations

of said paragraph, Respondent avers that the proper method of computing Baker's probable quarterly earnings as a distributor, without in any way admitting or acknowledging that the same is in any way relevant, pertinent or appropriate hereto, or lawfully a proper subject for consideration in this proceeding, would be, first, to determine Baker's estimated case sales as a distributor by applying the ratio obtained by the method described in paragraph II above to the average route case sales of Respondent, and, second, to determine the average net profit per case, during 1968, of the five most successful distributors under contract to Respondent and, third, apply said net-profit-per-case factor to Baker's probable case sales to determine probable net earnings in this connection. The computation to determine Baker's probable case sales is contained in Exhibit "C" attached hereto and, by this reference, incorporated herein; the computation to determine 1968 average net profit per case of the five most successful distributors under contract to Respondent is set forth in Exhibit "D" attached hereto, and, by this reference, incorporated herein; the consequent probable earnings of Baker as a distributor during the period under review, determined in accordance with the method above described is shown in Exhibit "E", attached hereto, and, by this reference, incorporated herein.

VI.

In answer to the allegations of paragraph 6 thereof, Respondent is informed and believes and, therefore, admits that Baker was employed at gainful employment during the backpay period; further answering the allegations thereof, Respondent alleges, however, that it has no information sufficient to enable it to form a belief concerning the amount or character of any earnings

or expenses, whether deductible or otherwise, of Baker during the backpay period, and basing its answer upon said lack of information of belief, Respondent denies, all and singular, generally and specifically, each and every allegation of said paragraph 6.

VII.

In answer to paragraphs 7 and 8 thereof, including the summary of "facts and calculations" immediately following paragraph 8 on page 4 thereof, Respondent denies, all and singular, generally and specifically, each and every allegation thereof. Further answering said paragraphs and allegations, Respondent alleges:

(a) That Baker is entitled to backpay only for the period 24 August, 1963 through 11 December, 1968;

(b) That the only appropriate rate of backpay allowable and payable under law is that set forth in paragraph III of this, Respondent's answer;

(c) That the total gross backpay payable to Baker as so calculated amounts to $38,442;

(d) That even if, as contended, by the Regional Director, it were appropriate to consider Baker's probable earnings as a Distributor (which is disputed and denied by Respondent) during the period 1 October, 1964 through 11 December, 1968, the appropriate gross total which would be as follows:

Driver-Salesmen compensation, 24 August, 1963 —30 September, 1964: $7,213

Independent Distributor Earnings, 1 October, 1964—11 December, 1968: $41,964;

(e) For lack of information sufficient to form a belief thereon, Respondent is unable to allege Baker's net earnings during the backpay period, and is, as a

consequence, unable to aver what, if any, net backpay would be due and payable to Baker; based upon its information and belief, however, Respondent alleges that, for the backpay period, Baker's actual net earnings, in the aggregate exceeds the gross backpay amounts hereinabove set forth, and that, as a consequence, there is no backpay liability to Baker on the part of Respondent.

Dated: 19 Nov. '69.

HODGE, JACKSON, KUMLER & CROSKEY

By /s/ M. B. Jackson

[Affidavit of Service Omitted in Printing]

EXHIBIT 1(k).

Order Rescheduling Hearing.

[Title Omitted in Printing]

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be, and the same hereby is, rescheduled from December 16, 1969, to February 3, 1970, at 10 a.m., Pacific Standard Time, in Courtroom No. 2 (Room 2407), Federal District Court, 650 Capitol Mall, Sacramento, California.

DATED AT San Francisco, California, this 8th day of December, 1969.

/s/ Roy O. Hoffman

Roy O. Hoffman, Regional Director

National Labor Relations Board
Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

EXHIBIT 1(m).

Supplemental Backpay Specification and Notice of Hearing.

[Title Omitted in Printing]

The National Labor Relations Board, having on June 10, 1964, issued an order directing Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento (herein referred to as Respondent Golden State), its officers, agents, successors and assigns to make whole discriminatee Kenneth L. Baker for his losses resulting from Respondent Golden State's unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, All American Beverages, Inc. d/b/a Pepsi-Cola Bottling Co. of Sacramento (herein referred to as Respondent All American) having on or about January 31, 1968 purchased Respondent Golden State's bottling business under circumstances which render Respondent All American a successor to Respondent Golden State within the meaning of the Board's Order, the United States Court of Appeals for the Ninth Circuit having on November 27, 1968 entered its Decree enforcing in full the backpay provisions of the Board's Order herein, and controversy having arisen over the amount of backpay due under the terms of the Board's Order, the Regional Director of the National Labor Relations Board for the Twentieth Region, pursuant to authority duly conferred upon him by the Board, hereby withdraws the Backpay Specification heretofore issued on September 30, 1969, issues this Supplemental Backpay Specification and alleges as follows:

1.

The backpay period for Baker begins on August 24, 1963,[1] and continues to run.[2]

2.

An appropriate measure of the gross backpay Baker would have earned from August 24, 1963 through September 30, 1964[3] is the total of the base pay which Respondent Golden State paid its driver-salesmen during the period, plus the commissions which Baker might reasonably have earned during that period, plus the Christmas bonus he would have received in December, 1963, plus the value of uniforms which Respondent Golden State supplied its driver-salesmen.

(a) From August, 1963 through March 31, 1964, the base pay for driver-salesmen employed by Respondent Golden State was $118 per week.

(b) From April 1, 1964 through September 30, 1964, the base pay for driver-salesmen employed by Respondent Golden State was $123 per week.

(c) An appropriate measure of the commissions which Baker would have received from sales in each quarter for the period from August 24, 1963 through September 30, 1964 is derived by dividing the commissions which Baker received in the fourth quarter of 1962 and in the first quarter of 1963 by the average total commissions, for the same period, earned by all

---

[1]Baker was terminated on August 16, 1963, but was given one week of vacation pay.

[2]Neither Respondent Golden State nor Respondent All American has offered to reinstate Baker to employment which is substantially equivalent to what he would have had, if he had not been discharged.

[3]After September 30, 1964, Baker would have been compensated as a distributor on a straight commission basis. Computations for the backpay period subsequent to September 30, 1964 are set forth in paragraph 5 below and Appendix C.

the driver-salesmen who worked throughout both of those quarters, and then multiplying the quotient resulting from such computation by the average total commissions earned by the driver-salesmen employed by Respondent Golden State for each calendar quarter in the period from August 24, 1963 through September 30, 1964. These computations are set forth in attached Appendix A, which is made a part hereof.

(d) Baker would have received from Respondent Golden State in December, 1963 a Christmas bonus totalling $45.00.

(e) The uniforms which Respondent Golden State furnished its driver-salesmen had a fair market value of $8 per quarter.

3.

The gross backpay which Baker would have received each calendar quarter from August 24, 1963 through September 30, 1964 is set forth in Appendix B, which is made a part hereof.

4.

It is reasonable to assume that, absent the unlawful discrimination against Baker, prior to October 1, 1964, Respondent Golden State would have offered Baker a distributorship under which he would have been converted from the status of driver-salesman and compensated solely by receipt of a percentage of sales made and that Baker would have accepted this offer effective October 1, 1964.

5.

(a) An appropriate measure of Baker's gross backpay for the period beginning October 1, 1964 and continuing to date is the total of the commissions he would have received as a distributor.

(b) An appropriate measure of the commissions Baker would have received as a distributor is the net earnings received from commissions during the same period by distributor Donald Thorne who, at all times material herein, has been comparable to Baker in on-the-job skills and performance.

(c) An appropriate means of determining Thorne's earnings for each quarter through calendar year 1968[4] is to multiply his net total commissions in each calendar year by the quotient obtained when the number of cases of beverage sold by Thorne in each quarter of such year is divided by the total number of cases of beverage he sold in that year.

(d) An appropriate means of estimating Thorne's earnings for each quarter of 1969 is to add Thorne's earnings for the same quarter in each of the preceding years and to divide the sum of these earnings by the number of quarters added.

(e) The computations of net commissions which Baker would have earned for each quarter from October 1, 1964 through June 30, 1969[5] are set forth in attached Appendices C-1 and C-2, which are made a part hereof.

6.

(a) It is admitted that Baker made interim earnings during the backpay period in the amounts set forth in attached Appendix D, which is made a part hereof.

---

[4]Thorne's net commissions are only available on a calendar year basis and therefore precise determination of Baker's gross backpay cannot be made subsequent to December 31, 1968. An appropriate means of estimating backpay after December 31, 1968 is alleged in paragraph 5(d).

[5]The backpay period continues to run as alleged in paragraph 1 above but for the purpose of this Specification calculations have been cut off at June 30, 1969.

(b) Baker incurred deductible expenses in each quarter of the backpay period in the amounts set forth in attached Appendix D.

(c) Net interim earnings is the difference between interim earnings and deductible expenses as set forth in Appendix D.

7.

(a) Baker's net backpay through December 30, 1968 is set forth in Appendix E-1, which is made a part hereof.

(b) Baker's estimated net backpay from January 1, 1969 through June 30, 1969 is set forth in Appendix E-2, which is made a part hereof.

8.

(a) Baker's total net backpay through December 31, 1968 and before applicable tax deductions amounts to $17,148.

(b) Baker's total estimated net backpay from January 1, 1969 through June 30, 1969 amounts to $390.

(c) Baker's backpay continues to run and will continue to run until such time as Respondent Golden State or Respondent All American offers Baker employment which is substantially equivalent to what he would have had, if he had not been discharged.

9.

(a) Since on or about January 31, 1968, Respondent All American, a Delaware corporation previously incorporated under the name of Sam Snead All American Golf, Inc., has been engaged in the operation of a soft drink bottling plant and in the sale and distribution of soft drinks at wholesale.

(b) During the past calendar year, Respondent All American, in the course and conduct of its business operations described in paragraph 9(a) above, purchased and received goods and services valued in excess of $50,000 directly from points and places located outside the State of California.

(c) Respondent All American is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

10.

At all times material herein, Morton B. Jackson has been an attorney for All American acting as an agent on its behalf within the meaning of Section 2(13) of the Act.

11.

(a) On or about January 31, 1968, Respondent All American purchased all assets and property owned and used by Respondent Golden State in its bottling business in Sacramento, California.

(b) Subsequent to the purchase alleged in paragraph 11(a) above, Respondent All American continued business operations at the bottling plant under the same trade name and at the same location used by Respondent Golden State at the time of said purchase.

(c) Subsequent to the purchase alleged in paragraph 11(a) above, Respondent All American retained the same customer accounts held by Respondent Golden State at the time of said purchase.

(d) Subsequent to the purchase alleged in paragraph 11(a) above, Respondent All American employed all supervisory and managerial personnel and a majority of the employees employed by Respondent Golden State at the time of said purchase.

(e) At all times subsequent to the purchase alleged in paragraph 11(a) above, Gene O. Schilling, General Manager of Respondent Golden State at the time of said purchase as well as at the time of the commission of the unfair labor practices which constitute the subject of this unfair labor practice matter, has been President and General Manager of the division of All American which operates its bottling plant in Sacramento, California.

(f) At all times material herein, All American has been aware of the existence and pendency of the unfair labor practices which constitute the subject of this unfair labor practice matter.

12.

(a) Since on or about January 31, 1968, by virtue of the circumstances alleged in paragraph 11 above, Respondent All American has been, and continues to be, a successor to Respondent Golden State and thereby subject to the Board Order and Court Decree directing Respondent Golden State, its officers, agents, successors and assigns to make whole discriminatee Kenneth L. Baker for his losses resulting from Respondent Golden State's unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

(b) Respondent All American, as a successor to Respondent Golden State, is jointly and severally liable with Respondent Golden State to make Baker whole for all backpay which has accrued and will continue to accrue until such time as Respondent All American or Respondent Golden State offers Baker employment which is substantially equivalent to what he would have had, if he had not been discriminated against by Respondent Golden State.

(e) Respondent All American's obligation under the Board Order and Court Decree will be discharged by the satisfaction of all obligations heretofore alleged as owing by Respondent Golden State in paragraphs one through eight above.

Summarizing the facts and calculations specified above, the obligations of Respondent Golden State and Respondent All American to make whole Baker under the Board Order and the Court Decree will be discharged by payment to Baker of $17,148, plus the total additional net backpay which has accrued since December 31, 1968 and will accrue until Respondent Golden State or Respondent All American offers Baker reinstatement in accordance with said Order and Decree, plus interest accrued at the rate of six percent (6%) per annum on all unpaid balances of backpay computed for each calendar quarter from the first day of the ensuing quarter until paid in full pursuant to said Order and Decree, minus the tax withholdings required by Federal and State Laws.

YOU ARE HEREBY NOTIFIED that, pursuant to Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, Respondent Golden State and Respondent All American shall each file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to this Supplemental Backpay Specification within fifteen (15) days from the service hereof. To the extent that an Answer fails to deny allegations of the Supplemental Backpay Specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed

to be admitted to be true as to Respondent Golden State and/or Respondent All American and the particular Respondent shall be precluded from introducing any evidence controverting them.

PLEASE TAKE NOTICE that on the 3rd day of February, 1970, at 10 a.m., Pacific Standard Time, in Courtroom No. 2 (Room 2407), Federal Building, 650 Capitol Mall, Sacramento, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in this Supplemental Backpay Specification, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

DATED AT San Francisco, California, this 19th day of December, 1969.

/s/ Roy O. Hoffman

Roy O. Hoffman, Regional Director

National Labor Relations Board
Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

APPENDIX A

COMPUTATION OF QUARTERLY COMMISSIONS DUE KENNETH L. BAKER FOR PERIOD AUGUST 24, 1963, THROUGH SEPTEMBER 30, 1964

1962 — 4th Quarter

Commissions earned by Baker — $45.50
Total commissions earned by 15 driver-salesmen — $516.06
Average commission earned by all driver-salesmen — $34.40

1963 — 1st Quarter

Commissions earned by Baker — $73.54
Total commissions earned by 13 driver-salesmen — $492.57
Average commissions earned by all driver-salesmen — $37.89

Total commissions earned by Baker in both quarters ($118.94) divided by average commissions earned by all salesmen in both quarters ($72.29) = 165%

Determination of Ratio: Base Period 1962-4th quarter and 1963-1st quarter

QUARTER	1963-3rd	1963-4th	1964-1st	1964-2nd	1964-3rd
Total commissions for full time drivers	$388.90[1]	$185.65	$507.37	$283.52	$1,654.54
No. of full time drivers	15	16	16	16	18
Average commissions per driver	$ 25.93	$ 11.60	$ 31.71	$ 17.72	$ 91.92
Commissions to be credited to Baker[2]	$ 42.78	$ 19.14	$ 52.32	$ 29.24	$ 151.67

[1]This figure represents the total commissions earned by full-time driver-salesmen ($402.95) less the commissions of driver-salesmen who worked part of the quarter ($14.05).

[2]Average commissions multiplied by ratio of 165%.

APPENDIX B

QUARTERLY GROSS BACKPAY[1] PRIOR TO CREATION OF DISTRIBUTORSHIPS

QUARTER		
1963-3rd[2]	Base pay (5 2/5 weeks x $118/wk.)	$637
	Commissions (from Appendix A)	43
	Uniforms	8
	Total	$688
1963-4th	Base pay (13 weeks x $118/wk.)	$1,534
	Commissions (from Appendix A)	19
	Uniforms	8
	Christmas bonus	45
	Total	$1,606
1964-1st	Base pay (13 weeks x $118/wk.)	$1,534
	Commissions (from Appendix A)	52
	Uniforms	8
	Total	$1,594
1964-2nd	Base pay (13 weeks x $123/wk.)	$1,599
	Commissions	29
	Uniforms	8
	Total	$1,636
1964-3rd	Base pay (13 weeks x $123/wk.)	$1,599
	Commissions	152
	Uniforms	8
	Total	$1,759

[1]Amounts rounded off to closest dollar amount.

[2]From August 24 through September 30.

APPENDIX C-1

Computation of Baker's gross backpay[1] from October 1, 1964 through December 31, 1968, based on the distribution of Thorne's earnings by calendar quarters.

QUARTER	No. of Cases Sold[2]	Percentage by Quarters[3]	Gross Backpay[4]
1964-4th	12.0	100%	$2,920
Total 1964	12.0	100%	$2,920
1965-1st	11.3	21.1	$2,255
-2nd	13.7	25.6	2,736
-3rd	15.3	28.6	3,057
-4th	13.2	24.7	2,640
Total 1965	53.5	100%	$10,688
1966-1st	13.2	23.4	$2,887
-2nd	14.9	26.4	3,257
-3rd	15.7	27.7	3,417
-4th	12.7	22.5	2,776
Total 1966	56.5	100%	$12,337
1967-1st	13.3	22.9	$2,776
-2nd	14.9	25.6	3,104
-3rd	16.7	28.8	3,491
-4th	13.2	22.7	2,752
Total 1967	58.1	100%	$12,123
1968-1st	14.5	21.7	$3,211
-2nd	18.3	27.4	4,054
-3rd	19.2	28.7	4,247
-4th	14.8	22.2	3,285
Total 1968	66.8	100%	$14,797

[1]Amounts rounded off to closest dollar amount.

[2]In 100's.

[3]Cases sold in quarter divided by total cases sold in year.

[4]Annual earnings multiplied by percentage of cases sold each quarter.

APPENDIX C-2

Computation of Baker's estimated gross backpay[1] from January 1, 1969 through June 30, 1969 based on an average of Thorne's earnings for corresponding quarters in calendar years 1965 through 1968.

1969 - 1st Quarter	
1965 - 1st	$2255
1966 - 1st	2887
1967 - 1st	2776
1968 - 1st	3211
TOTAL	$11,129 ÷ 4 Quarters = $2,782
1969 - 2nd Quarter	
1965 - 2nd	$2736
1966 - 2nd	3257
1967 - 2nd	3104
1968 - 2nd	4054
TOTAL	$13,151 ÷ 4 Quarters = $3,288

[1]Amounts rounded off to closest dollar amount.

APPENDIX D

Baker's Net Interim Earnings[1]

Quarter			
1963 - 3rd	Interim Earnings		
	Zellerbach Paper Company	$ 526	
	Teamsters Local 150	176	
	TOTAL		$ 702
	Deductible Expenses		
	Seeking Work (250 miles at 10¢/mi)	$ 25	
	Extra commute (240 miles at 10¢/mi)	20	
	TOTAL	45	
	Less: dues that would have been paid to P.C.B.C.E., Inc.	2	
	NET TOTAL		43
	NET INTERIM EARNINGS		$ 659
1963 - 4th	Interim Earnings		
	Zellerbach Paper Company	$1,403	
	Teamsters Local 150	144	
	Lovotti Bros. Distributors	128	
	TOTAL		$1,675
	Deductible Expenses		
	Seeking Work (200 miles)	$ 20	
	Extra commute (312 miles)	31	
	TOTAL	51	
	Less: dues that would have been paid to P.C.B.C.E., Inc.	6	
	NET TOTAL		45
	NET INTERIM EARNINGS		$1,630
1964 - 1st	Interim Earnings		
	Zellerbach Paper Company		$1,653

[1]Amounts rounded off to closest dollar amount.

	Deductible Expenses		
	Extra commute (312 miles)	$ 31	
	Teamsters reinstatement fee and dues	102	
	TOTAL	133	
	Less: dues that would have been paid to P.C.B.C.E., Inc.	6	
	NET TOTAL		127
	NET INTERIM EARNINGS		$1,526
Quarter			
1964 - 2nd	Interim Earnings		
	Zellerbach Paper Company		$1,664
	Deductible Expenses		
	Extra commute (310 miles)	$ 31	
	Teamster dues	20	
	TOTAL	51	
	Less: dues that would have been paid to P.C.B.C.E., Inc.	6	
	NET TOTAL		45
	NET INTERIM EARNINGS		$1,619
1964 - 3rd	Interim Earnings		
	Zellerbach Paper Company	$1,441	
	Interstate Motor Lines	43	
	Southern California Freight Lines and O-N-C Fast Freight, Inc.	174	
	Arrow Trucking Co.	15	
	Di Salvo Trucking Co.	7	
	TOTAL		$1,680
	Deductible Expenses		
	Extra commute	31	
	Teamster dues	20	
	TOTAL	51	
	Less: dues that would have been paid to P.C.B.C.E., Inc.	6	
	NET TOTAL		45
	NET INTERIM EARNINGS		$1,635

1964 - 4th	Interim Earnings		
	Zellerbach Paper Company	$1,962	
	Southern California Freight Lines and O-N-C Fast Freight, Inc.	190	
	TOTAL		$2,152
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	20	
	TOTAL[3]		51
	NET INTERIM EARNINGS		$2,101
Quarter			
1965 - 1st	Interim Earnings		
	Zellerbach Paper Company	$1,611	
	Southern California Freight Lines and O-N-C Fast Freight, Inc.	26	
	TOTAL		$1,637
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	20	
	TOTAL		51
	NET INTERIM EARNINGS		$1,586
1965 - 2nd	Interim Earnings		
	Zellerbach Paper Company		$1,672
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	20	
	TOTAL		51
	NET INTERIM EARNINGS		$1,621
1965 - 3rd	Interim Earnings		
	Zellerbach Paper Company		$2,107

[3]On and after October 1, 1964, Baker would have been a distributor and thereafter would not have had to pay dues to P.C.B.C.E., Inc.

Quarter				
	Deductible Expenses			
	Extra commute		31	
	Teamsters dues		20	
	TOTAL			51
	NET INTERIM EARNINGS			$2,056
1965 - 4th	Interim Earnings			
	Zellerbach Paper Company			$2,147
	Deductible Expenses			
	Extra commute		31	
	Teamsters dues		20	
	TOTAL			51
	NET INTERIM EARNINGS			$2,096
1966 - 1st	Interim Earnings			
	Zellerbach Paper Company			$1,711
	Deductible Expenses			
	Extra commute		31	
	Teamsters dues		20	
	TOTAL			51
	NET INTERIM EARNINGS			$1,660
1966 - 2nd	Interim Earnings			
	Zellerbach Paper Company			$1,851
	Deductible Expenses			
	Extra commute		31	
	Teamsters dues		20	
	TOTAL			51
	NET INTERIM EARNINGS			$1,800
1966 - 3rd	Interim Earnings			
	Zellerbach Paper Company			$2,439
	Deductible Expenses			
	Extra commute		31	
	Teamsters dues		20	
	TOTAL			51
	NET INTERIM EARNINGS			$2,388

1966 - 4th	Interim Earnings		
	Zellerbach Paper Company		$2,334
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,280
1967 - 1st	Interim Earnings		
	Zellerbach Paper Company		$1,809
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$1,755
Quarter			
1967 - 2nd	Interim Earnings		
	Zellerbach Paper Company	$1,811	
	Pacific Maritime Association	258	
	TOTAL		$2,069
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,015
1967 - 3rd	Interim Earnings		
	Zellerbach Paper Company		$2,141
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,087
1967 - 4th	Interim Earnings		
	Zellerbach Paper Company		$2,566

	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,512
1968 - 1st	Interim Earnings		
	Zellerbach Paper Company		$2,134
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,080
1968 - 2nd	Interim Earnings		
	Zellerbach Paper Company		$2,504
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,450
Quarter			
1968 - 3rd	Interim Earnings		
	Zellerbach Paper Company		$2,605
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,551
1968 - 4th	Interim Earnings		
	Zellerbach Paper Company		$2,971
	Deductible Expenses		
	Extra commute	31	
	Teamsters dues	23	
	TOTAL		54
	NET INTERIM EARNINGS		$2,917

1969 - 1st	**Interim Earnings**		
	Zellerbach Paper Company		**$2,329**
	Deductible Expenses		
	Extra commute	**31**	
	Teamsters dues	**23**	
	TOTAL		**54**
	NET INTERIM EARNINGS		**$2,275**
1969 - 2nd	**Interim Earnings**		
	Zellerbach Paper Company		**$2,959**
	Deductible Expenses		
	Extra commute	**31**	
	Teamsters dues	**23**	
	TOTAL		**54**
	NET INTERIM EARNINGS		**$2,905**

APPENDIX E-1

Baker's Net Backpay through December 30, 1968

Quarter	Gross[1] Backpay	Net Interim[2] Earnings	Net[3] Backpay
1963-3rd	688	659	29
1963-4th	1606	1630	—
1964-1st	1594	1526	68
1964-2nd	1636	1619	17
1964-3rd	1759	1635	124
1964-4th	2920	2101	819
1965-1st	2255	1586	669
1965-2nd	2736	1621	1115
1965-3rd	3057	2056	1001
1965-4th	2640	2096	544
1966-1st	2887	1660	1227
1966-2nd	3257	1800	1457
1966-3rd	3417	2388	1029
1966-4th	2776	2280	496
1967-1st	2776	1755	1021
1967-2nd	3104	2015	1089
1967-3rd	3491	2087	1404
1967-4th	2752	2512	240
1968-1st	3211	2080	1131
1968-2nd	4054	2450	1604
1968-3rd	4247	2551	1696
1968-4th	3285	2917	368
		TOTAL	17148

[1]From Appendices B and C.

[2]From Appendix D.

[3]Gross backpay less net interim earnings.

APPENDIX E-2

Baker's estimated backpay from January 1, 1969 through June 30, 1969

Quarter	Gross Backpay[1]	Net Interim Earnings[2]	Net Backpay[3]
1969-1st	$2,782	$2,275	$ 7
1969-2nd	3,288	2,905	383
			$390

[1]From Appendix C-2.
[2]From Appendix D.
[3]Gross backpay less net interim earnings.

EXHIBIT 1(e).

Motion to Amend Case Caption.

[Title Omitted in Printing]

On the 30th day of September, 1969, the Regional Director of the National Labor Relations Board for the Twentieth Region, pursuant to authority duly conferred upon him by the Board, issued a Backpay Specification and Notice of Hearing in the above-captioned case. Subsequent to the issuance of said Backpay Specification, the Regional Office received information, not previously available, indicating that All American Beverages, Inc. d/b/a Pepsi-Cola Bottling Co. of Sacramento, herein referred to as Respondent All American, is a successor to Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento, herein referred to as Respondent Golden State, and is thereby subject to the Decree issued on November 27, 1968 by the United States Court of Appeals for the Ninth Circuit enforcing the Board's Order against Golden State, its successors and assigns. After being advised of this additional information, said Regional Director on December 8, 1969 issued an order rescheduling the hearing in this matter from December 16, 1969 to February 3, 1970. On December 19, 1969 said Regional Director withdrew the Backpay Specification previously issued on September 30, 1969 and issued a Supplemental Backpay Specification and Notice of Hearing alleging Respondent All American as a successor to Respondent Golden State and thereby jointly and severally liable with Respondent Golden State for all backpay owing discriminatee Kenneth L. Baker. Wherefore the undersigned Counsel for General Counsel hereby moves to amend the official caption of this matter to read as follows:

GOLDEN STATE BOTTLING COMPANY, INC.

d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO and ALL AMERICAN BEVERAGES, INC. d/b/a PEPSI-COLA BOTTLING CO. OF SACRAMENTO,

and

EDWARD J. FARRELL, An Individual

and

P.C.B.C.E., INC., Party to the Contract
Case No. 20-CA-2656

DATED AT San Francisco, California, this 23rd day of December, 1969.

/s/ Douglas H. Barton
Douglas H. Barton
Counsel for the General Counsel
National Labor Relations Board
Twentieth Region
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

EXHIBIT 1(t).

Answer of Respondents to Supplemental Back Pay Specification.

United States of America, Before the National Labor Relations Board.

Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento and All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Co. of Sacramento, and Edward J. Farrell, An Individual and P.C.B.C.E., Inc., Party to the Contract. No. 20-CA-2656.

COME NOW GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO, (herein called "Golden State"), and ALL AMERICAN BEVERAGES, INC., presently d/b/a PEPSI-COLA COMPANY OF SACRAMENTO, (herein called "All American"), Respondents above named, and, for their answer to the Supplemental Back Pay Specification filed herein, admit, allege and deny as follows:

I

In answer to the preamble of said Supplemental Back Pay Specification (herein called "Specification"), on Page 1 thereof, Respondents, and each of them,

(a) Allege that Golden State is a California Corporation; that until 31 January, 1968, it was engaged in business in and about the city of Sacramento, California, as a soft drink bottler and distributor of Pepsi-Cola products, doing business under the name Pepsi-Cola Bottling Company of Sacramento; that it is the Respondent originally named herein;

(b) Allege that All American Beverages, Inc., is a Delaware Corporation, having its corporate offices located in Providence, Rhode Island, and its executive offices in Springfield, Ohio; that, in addition to its Sacramento Pepsi-Cola operation described below, it is engaged in the bottling and distribution of Pepsi-Cola and Dr. Pepper products in and about Springfield, Ohio, and in the operation of a Par-3 golf course in San Diego, California; that the officers, shareholders, property and interests of Golden State and All American are wholly separate and distinct and independent one from the other; that until the purchase and sale hereinafter set forth, said Respondents were strangers one to the other;

(c) Allege that on or about 31 January, 1968, All American purchased, effective on said date, all of the assets and property of Golden State constituting its Pepsi-Cola soft drink bottling and distribution business and operation in and around said city of Sacramento; that on and after said date Golden State ceased to have any interest therein, ceased doing business as Pepsi-Cola Bottling Company of Sacramento, and ceased all interest and activity in the soft drink bottling and distribution business; that on and after said date, All American engaged in and carried on the business of Pepsi-Cola soft drink bottler in Sacramento and conducted business under the name and style of "Pepsi-Cola Bottling Co. of Sacramento, a Division of All American Beverages, Inc.";

(d) Allege that the foregoing transaction was a bona-fide sale by Golden State, on the one hand, and purchase by All American, on the other hand; that any liability of Golden State in respect of unfair

labor practices involving Kenneth L. Baker, ("Baker" herein), as alleged, as well as any duty on the part of said Respondent to offer reinstatement to said Baker, ceased and terminated on 31 January, 1968, by virtue of said sale and by virtue of said Respondent's having ceased to engage in the soft drink bottling and distribution business.

(e) Deny, generally and specifically, that All American is a "successor to Respondent Golden State within the meaning of the Board's Order", or that All American is liable in any manner to make said Baker whole in any respect, whether jointly or severally with Golden State or otherwise, or that All American is in any way liable or obligated under or by reason of said Board Order and Court Decree therein alleged.

II

In answer to the allegations of Paragraph 1 of said Specification, Respondents admit that the back pay period for Baker begins on 24 August, 1963, but deny, generally and specifically, that said period continues to run, in that said period terminated on 31 January, 1968, by reason of the facts and circumstances alleged in Paragraph 1 hereof; Respondents further deny, generally and specifically, the allegations contained in Footnote 2 to said Paragraph 1.

III

In answer to Paragraph 2 of said Specification, Respondents deny that subsequent to 30 September, 1964, Baker would have been compensated either as a distributor or on a straight commission basis and, therefore, allege that the appropriate period for the purposes of this paragraph is and should be 24 August, 1963 to 31 January, 1968. Further answering the al-

legations of said Paragraph 2, Respondents deny, all and singular, generally and specifically, each and every allegation of subparagraph (c) thereof, and, in this connection, allege that the appropriate method for determining the commissions Baker might reasonably have expected to earn during the aforementioned period, is, first, to determine the ratio of Baker's case sales to the mean case sales of all full time driver-salesmen on a monthly basis for each of the fourteen months of Baker's employment by Golden State and, second, by dividing the sum of said ratios by fourteen (14), to determine the average ratio of Baker's case sales to the mean case sales of all full time driver-salesmen expressed as a percentage and, third, to apply said percentage of the average commission earnings of the full time driver-salesmen employed by Golden State during said period in order to determine the commissions which Baker, with reasonable probability would have earned during the same period. These computations are set forth in Exhibit "A" attached hereto, and, by this reference, made a part hereof. Respondents admit the remaining allegations of said Paragraph 2, to the extent that the same are not denied or otherwise modified or affected by the foregoing.

IV

In answer to Paragraph 3 of said Specification, Respondents deny, all and singular, generally and specifically, each and every allegation thereof, and, in this connection, allege that the period specified and the amounts set forth are inappropriate and incorrect for the reasons hereinabove and hereinbelow set forth, and further allege that the gross pay which Baker might reasonably have been expected to earn during the

period 24 August, 1963 through 31 January, 1968, is that set forth in Exhibit "B" attached hereto and, by this reference, made a part hereof.

V

In answer to Paragraph 4, of said Specification, Respondents deny, all and singular, generally and specifically, each and every allegation thereof, and every matter, fact and thing therein contained, and, in this connection, specifically deny:

(a) That Baker would have been offered a distributorship by Golden State, or

(b) That independent distributors under contract to Golden State are or ever have been paid compensation by Golden State, or that such distributors are or ever have been, in fact, "compensated solely by receipt of a percentage of sales made", or

(c) That Respondents, or either of them, in any event, can lawfully be held liable to Baker for any amounts which Baker might have earned as an independent distributor.

VI

In answer to Paragraph 5 thereof, Respondents deny, all and singular, generally and specifically, each and every allegation thereof and every matter, fact and thing therein contained. Further answering the allegations of said Paragraph, Respondents, without any way admitting or acknowledging that the same is in any manner relevant, pertinent or appropriate hereto, or lawfully a proper subject for consideration in this proceeding, aver that the proper method of computing Baker's probable quarterly earnings as a distributor (assuming for the sake of argument that the same was

pertinent or proper, which is denied) would be first, to determine Baker's estimated case sales as a distributor by applying the ratio obtained by the method described in Paragraph III above to the average route case sales of Golden State and, second, to determine the average net profits per case, during 1968, of the five most successful distributors and, third, to apply said net-profit-per-case factor to Baker's probable case sales in order to determine probable net earnings in this connection. The computation to determine Baker's probable case sales in this manner is contained in Exhibit "C" attached hereto and, by this reference, incorporated herein; the consequent probable earnings of Baker as a distributor during the period under review, determined in accordance with the method above described, is shown in Exhibit "E" attached hereto and, by this reference, incorporated herein.

VII

In answer to the allegations of Paragraph 6 of said Specification, Respondents allege that they are informed and believe and, therefore, admit that Baker was employed at gainful employment during the back pay period; further answering the allegations thereof, Respondents allege, however, that they have no information sufficient to enable them to form a belief concerning the amount or character of any earnings or expenses, whether deductible or otherwise, of Baker during the back pay period (other than the allegations contained in said Specification) and basing their answer upon said lack of information or belief, Respondents deny, all and singular, generally and specifically, each and every allegation of said Paragraph 6.

VIII

In answer to Paragraphs 7 and 8 of said Specification, Respondents deny, all and singular, generally and specifically, each and every allegation thereof. Further answering said paragraphs and allegations, Respondents allege:

(a) That Baker is entitled to back pay only for the period 24 August, 1963, through 31 January, 1968;

(b) That the only appropriate rate of back pay allowable and payable under law is that set forth in Paragraph IV of this, Respondents' Answer;

(c) That the total gross back pay payable to Baker as so calculated amounts to $31,610.00;

(d) That even if, as contended by the Regional Director, it were appropriate to consider Baker's probable earnings as a distributor (which is disputed and denied by Respondents) during the period 1 October, 1964 through 31 January, 1968, the appropriate gross total would be as follows:

Driver-Salesman Compensation, 24 August, 1963-30 September, 1964:	$ 7,208.00
Independent Distributor earnings, 1 October, 1964-31 January, 1968:	32,264.00

(e) For lack of information sufficient to form a belief thereon, Respondents are unable to allege Baker's net earnings during the back pay period and are, as a consequence, unable to aver precisely what, if any, net back pay would be due and payable to Baker; based upon their information and belief, however, Respondents allege that, for the back pay period, Baker's actual net earnings, in the aggregate, exceed the gross back pay amounts hereinabove set forth and that, as a consequence, there exists no liability for net back pay to Baker.

IX

In answer to Paragraph 10 of said Specification, Respondents deny, all and singular, generally and specifically, each and every allegation of said Paragraph.

X

In answer to the allegations of Paragraph 11 of said Specification, Respondents

(a) Admit the allegations of subparagraph (a) thereof;

(b) Allege that on and subsequent to 31 January, 1968, All American did business in Sacramento under the trade name and style of "Pepsi-Cola Bottling Company of Sacramento, a Division of All American Beverages, Inc.", utilizing the location formerly used by Golden State at the time of said purchase; that All American retained substantially the same customer accounts held by Golden State at the time of the purchase alleged in subparagraph (a) of said paragraph 11; that subsequent to said purchase, All American employed a majority of the employees and some, but not all, of the supervisory and managerial personnel employed by Golden State at the time of said purchase;

(c) Admits the allegations of subparagraph (c) of said paragraph 11, and, further allege that said Schilling at no pertinent time, owned or controlled any proprietary interest in Golden State or All American and that said Schilling is not and never has been an officer or director of All American.

(d) Save and except as hereinabove admitted or alleged, Respondents deny, all and singular, generally and specifically, each and every allegation of said Paragraph 11.

XI

In answer to the allegations of Paragraph 12 of said Specification, Respondents deny, all and singular, generally and specifically, each and every allegation contained in said Paragraph and the summary immediately following.

Dated: 16 January, 1970.

JACKSON, KUMLER, COPES & CROSKEY

By /s/ Morton B. Jackson

Morton B. Jackson, Attorneys for Respondents.

EXHIBIT A

COMPUTATION OF COMMISSIONS

Year/Month	(1) Total Plant Case Sales	(2) No. of Men	(3) Mean Case Sales Per Man	(4) Baker's Case Sales	(4) : (3) As a Percent
1962					
July	54622	17	3213	3787	117.9
August	56721	17	3336	4308	129.1
September	43572	17	2563	3198	124.8
October	38766	17	2280	3052	133.9
November	40482	17	2381	3138	131.8
December	37018	17	2177	2890	132.8
1963					
January	35639	17	2097	2788	133.0
February	36937	17	2173	2782	128.0
March	40384	17	2375	3039	128.0
April	46729	17	2749	3560	129.5
May	40796	17	2400	3193	133.0
June	49334	19	2596	2983	114.9
July	59614	19	3137	3496	111.4
August	61075	19	3214	3532	109.9
				MEAN:	125.6%

Year				1963	1963
Quarter				3rd	4th
Total Commissions for full time salesmen				388.90	185.65
Number of full time salesmen				15	16
Average Commissions for full time salesmen				2593	11.60
Commission to be credited to Baker (125.6% of Ave.)				3257	14.70
Year	1964	1964	1964	1964	
Quarter	1st	2nd	3rd	4th	
Total Commissions for full time salesmen	507.37	283.52	1654.59	528.20	
Number of full time salesmen	16	16	18	9	

Average Commissions for full time salesmen	31.71	17.72	91.92	58.69
Commissions to be credited to Baker (125.6% of Ave.)	39.83	22.26	115.45	73.71

COMPUTATION OF COMMISSIONS

	Year	1965	1965	1965	1965
	Quarter	1st	2nd	3rd	4th
1.	Total Commissions for full time salesmen	389.84	178.56	261.24	282.65
2.	Number of full time salesmen	7	6	7	6
3.	Average Commissions for full time salesmen	55.69	29.76	37.32	47.11
4.	Commissions to be credited to Baker (125.6% of Ave.)	69.95	37.38	46.87	59.17

	Year	1966	1966	1966	1966
	Quarter	1st	2nd	3rd	4th
1.	Total Commissions for full time salesmen	359.90	678.70	374.00	129.70
2.	Number of full time salesmen	5	4	4	2
3.	Average Commissions for full time salesmen	71.98	169.68	93.50	64.85
4.	Commissions to be credited to Baker (125.6% of Ave.)	90.41	213.12	117.44	81.45

	Year	1967	1967	1967	1967
	Quarter	1st	2nd	3rd	4th
1.	Total Commissions for full time salesmen	-0-	-0-	645.06	321.06
2.	Number of full time salesmen			5	5
3.	Average Commissions for full time salesmen			129.01	64.21
4.	Commissions to be credited to Baker (125.6% of Ave.)	-0-	-0-	162.04	80.65

Year	1968
Quarter	1st
1. Total Commisions for full time salesmen	-0-
2. Number of full time salesmen	
3. Average Commissions for full time salesmen	
4. Commissions to be credited to Baker (125.6% of Ave.)	-0-

EXHIBIT B

QUARTERLY GROSS BACKPAY COMPUTATION

(Rounded to Nearest Dollar)
Periods Indicated

Quarter	Base Pay		Commissions (Exhibit A)	Uniforms	Christmas Bonus	Total for Quarter
1963						
3rd	5-2/5 weeks at 118.00	637	33	3		673
4th	13 weeks at 118.00	1,534	15	8	45	1,602
1964						
1st	13 weeks at 118.00	1,534	40	8		1,582
2nd	13 weeks at 123.00	1,599	22	8		1,629
3rd	13 weeks at 123.00	1,599	115	8		1,722
4th	13 weeks at 123.00	1,599	74	8	75	1,756
1965						
1st	13 weeks at 123.00	1,599	70	8		1,677
2nd	13 weeks at 128.00	1,664	37	8		1,709
3rd	13 weeks at 128.00	1,664	47	8		1,719
4th	13 weeks at 128.00	1,664	59	8	105	1,836
1966						
1st	13 weeks at 128.00	1,664	90	8		1,842
2nd	13 weeks at 133.00	1,729	213	8		1,950
3rd	13 weeks at 133.00	1,729	117	8		1,854
4th	13 weeks at 133.00	1,729	81	8	135	1,953
1967						
1st	13 weeks at 133.00	1,729	—	8		1,737
2nd	13 weeks at 138.50	1,801	—	8		1,809
3rd	13 weeks at 138.50	1,801	162	8		1,971
4th	13 weeks at 138.50	1,801	81	8	165	2,055
1968						
1st	4 weeks at 138.50	554		3		557

EXHIBIT C

BAKER'S PROBABLE CASE SALES

Periods Indicated

Month	FOURTH QUARTER 1964 Oct.	Nov.	Dec.
Total Cases	49,517	33,651	42,076
No. of Men	17	16	15
Average Cases Sold	2,913	2,103	2,805
Baker's Case Sales (125.6% of Ave.)	3,659	2,641	3,523
Total for Quarter			9,823

Month	FIRST QUARTER 1965 Jan.	Feb.	Mar.	SECOND QUARTER 1965 Apr.	May	Jun.
Total Cases	34,576	39,481	49,522	49,508	51,674	55,017
No. of Men	15	15	15	15	15	16
Average Cases Sold	2,305	2,632	3,301	3,301	3,445	3,439
Baker's Case Sales (125.6% of Ave.)	2,895	3,306	4,146	4,146	4,327	4,319
Total for Quarter			10,347			12,792

Month	THIRD QUARTER 1965 Jul.	Aug.	Sept.	FOURTH QUARTER 1965 Oct.	Nov.	Dec.
Total Cases	63,714	65,631	54,914	53,348	46,235	41,151
No. of Men	16	16	16	17	16	15
Average Cases Sold	3,982	4,102	3,432	3,138	2,890	2,743
Baker's Case Sales (125.6% of Ave.)	5,001	5,152	4,311	3,941	3,630	3,445
			14,464			11,016

Month	FIRST QUARTER 1966 Jan.	Feb.	Mar.	SECOND QUARTER 1966 Apr.	May	Jun.
Total Cases	40,879	38,066	51,233	55,208	67,389	70,078
No. of Men	14	14	14	14	16	16

EXHIBIT B

QUARTERLY GROSS BACKPAY COMPUTATION

(Rounded to Nearest Dollar)
Periods Indicated

Quarter	Base Pay		Commissions (Exhibit A)	Uniforms	Christmas Bonus	Total for Quarter
1963						
3rd	5-2/5 weeks at 118.00	637	33	3		673
4th	13 weeks at 118.00	1,534	15	8	45	1,602
1964						
1st	13 weeks at 118.00	1,534	40	8		1,582
2nd	13 weeks at 123.00	1,599	22	8		1,629
3rd	13 weeks at 123.00	1,599	115	8		1,722
4th	13 weeks at 123.00	1,599	74	8	75	1,756
1965						
1st	13 weeks at 123.00	1,599	70	8		1,677
2nd	13 weeks at 128.00	1,664	37	8		1,709
3rd	13 weeks at 128.00	1,664	47	8		1,719
4th	13 weeks at 128.00	1,664	59	8	105	1,836
1966						
1st	13 weeks at 128.00	1,664	90	8		1,842
2nd	13 weeks at 133.00	1,729	213	8		1,950
3rd	13 weeks at 133.00	1,729	117	8		1,854
4th	13 weeks at 133.00	1,729	81	8	135	1,953
1967						
1st	13 weeks at 133.00	1,729	—	8		1,737
2nd	13 weeks at 138.50	1,801	—	8		1,809
3rd	13 weeks at 138.50	1,801	162	8		1,971
4th	13 weeks at 138.50	1,801	81	8	165	2,055
1968						
1st	4 weeks at 138.50	554		3		557

EXHIBIT C

BAKER'S PROBABLE CASE SALES

Periods Indicated

Month	FOURTH QUARTER 1964 Oct.	Nov.	Dec.
Total Cases	49,517	33,651	42,076
No. of Men	17	16	15
Average Cases Sold	2,913	2,103	2,805
Baker's Case Sales (125.6% of Ave.)	3,659	2,641	3,523
Total for Quarter			9,823

Month	FIRST QUARTER 1965 Jan.	Feb.	Mar.	SECOND QUARTER 1965 Apr.	May	Jun.
Total Cases	34,576	39,481	49,522	49,508	51,674	55,017
No. of Men	15	15	15	15	15	16
Average Cases Sold	2,305	2,632	3,301	3,301	3,445	3,439
Baker's Case Sales (125.6% of Ave.)	2,895	3,306	4,146	4,146	4,327	4,319
Total for Quarter			10,347			12,792

Month	THIRD QUARTER 1965 Jul.	Aug.	Sept.	FOURTH QUARTER 1965 Oct.	Nov.	Dec.
Total Cases	63,714	65,631	54,914	53,348	46,235	41,151
No. of Men	16	16	16	17	16	15
Average Cases Sold	3,982	4,102	3,432	3,138	2,890	2,743
Baker's Case Sales (125.6% of Ave.)	5,001	5,152	4,311	3,941	3,630	3,445
			14,464			11,016

Month	FIRST QUARTER 1966 Jan.	Feb.	Mar.	SECOND QUARTER 1966 Apr.	May	Jun.
Total Cases	40,879	38,066	51,233	55,208	67,389	70,078
No. of Men	14	14	14	14	16	16

EXHIBIT C (continued)

Average Cases Sold	2,920	2,719	3,660	3,943	4,212	4,380
Baker's Case Sales (125.6% of Ave.)	3,668	3,415	4,597	4,952	5,290	5,501
Total for Quarter			11,680			15,743

	THIRD QUARTER 1966			FOURTH QUARTER 1966		
Month	Jul.	Aug.	Sept.	Oct.	Nov.	Dec.
Total Cases	62,681	81,144	66,726	59,783	51,890	44,307
No. of Men	15	16	16	16	16	14
Average Cases Sold	4,179	5,072	4,170	3,736	3,243	3,165
Baker's Case Sales (125.6% of Ave.)	5,249	6,370	5,238	4,692	4,073	3,975
Total for Quarter			16,857			12,746

	FIRST QUARTER 1967			SECOND QUARTER 1967		
Month	Jan.	Feb.	Mar.	Apr.	May	Jun.
Total Cases	50,591	50,417	62,966	43,362	80,202	79,625
No. of Men	16	16	16	17	18	19
Average Cases Sold	3,162	3,151	4,198	2,551	4,456	4,191
Baker's Case Sales (125.6% of Ave.)	3,971	3,958	5,273	3,204	5,597	5,264
Total for Quarter			13,202			14,065

	THIRD QUARTER 1967			FOURTH QUARTER 1967		
Month	Jul.	Aug.	Sept.	Oct.	Nov.	Dec.
Total Cases	83,659	95,976	69,781	62,641	57,652	54,847
No. of Men	19	19	19	18	18	18
Average Cases Sold	4,403	5,051	3,673	3,480	3,203	3,047
Baker's Case Sales (125.6% of Ave.)	5,530	6,344	4,613	4,371	4,023	3,827
Total for Quarter			16,487			12,221

Jan. 1968	
Total Cases	57,403
No. of Men	18
Average Cases Sold	3,189
Baker's Case Sales (125.6% of Ave.)	4,005

EXHIBIT D

AVERAGE NET PROFIT PER CASE
TOP FIVE DISTRIBUTORS
1968

Distributors	Cases Sold	Total Net Profit	Net Profit Per Case
Thorne	66,814	14,797.00	$0.2215
Harwood	65,353	8,444.99	0.1292
McHann	64,578	12,558.12	0.1945
Foster	60,481	11,843.59	0.1958
Murray	58,890	10,525.30	0.1787
		MEAN	$0.1839

EXHIBIT E

BAKER'S ESTIMATED EARNINGS AS A DISTRIBUTOR
Periods Indicated

	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
Year:	1964	1964	1964	1964
Baker's Estimated Case Sales (Exhibit C)				9,823
Baker's Estimated Net Profit per case (Exhibit D)				.1839
Baker's Estimated Earnings				$1,806
Year:	1965	1965	1965	1965
Baker's Estimated Case Sales (Exhibit C)	10,347	12,792	14,464	11,016
Baker's Estimated Net Profit per case (Exhibit D)	.1839	.1839	.1839	.1839
Baker's Estimated Earnings	$1,903	$2,352	$2,660	$2,026
Year:	1966	1966	1966	1966
Baker's Estimated Case Sales (Exhibit C)	11,680	15,743	16,857	12,740
Baker's Estimated Net Profit per case (Exhibit D)	.1839	.1839	.1839	.1839
Baker's Estimated Earnings	$2,148	$2,895	$3,100	$2,343
Year:	1967	1967	1967	1967
Baker's Estimated Case Sales (Exhibit C)	13,202	14,065	16,487	12,221
Baker's Estimated Net Profit per case (Exhibit D)	.1839	.1839	.1839	.1839
Baker's Estimated Earnings	$2,428	$2,587	$3,032	$2,247

BAKER'S ESTIMATED EARNINGS AS A DISTRIBUTOR

Periods Indicated

	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
Year:	1968 (Jan.)			
Baker's Estimated Case Sales (Exhibit C)	4,005			
Baker's Estimated Net Profit per case (Exhibit D)	.1839			
Baker's Estimated Earnings	$ 737			

[Affidavit of Service Omitted in Printing]

Trial Examiner's Supplemental Decision.

The Trial Examiner's Supplemental Decision (as adopted without modification or explanation by the National Labor Relations Board in its "Supplemental Decision and Order" set forth below) is set forth at length in the Appendix to the Petition for Certiorari, page one thereof, and is incorporated herein by reference. The Decision of the Trial Examiner, together with the decision of the Board, has been cumulatively referred to throughout the opening brief as the "Supplemental Decision."

Supplemental Decision and Order.

United States of America, Before the National Labor Relations Board.

Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento and All American Beverages, Inc. d/b/a Pepsi-Cola Bottling Co. of Sacramento[1] and Edward J. Farrell, An Individual and P.C.B.C.E., Inc., Party to the Contract. Case 20—CA—2656.

On June 10, 1964, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[2] finding that the Respondent Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento, had discriminatorily discharged Kenneth L. Baker in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as

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[1]At the opening of the hearing upon unopposed motion of the General Counsel, the caption was amended to include All American Beverages, Inc.

[2]147. NLRB 410.

amended, and directing that Golden State Bottling Company, Inc., offer to him immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings suffered by reason of the discrimination against him. On December 2, 1965, the United States Court of Appeals for the Ninth Circuit issued its decision[3] enforcing, *inter alia*, the Board's Order with respect to Baker. Because of a request by the Board for rehearing and other intervening factors, the court issued its final decree enforcing in full the Board's Order with respect to Baker on November 27, 1968.

A Backpay Specification and Notice of Hearing and a Supplemental Backpay Specification and Notice of Hearing were issued by the Regional Director for Region 20, and pursuant thereto a hearing was held on February 3 and 4, 1970, before Trial Examiner Robert L. Piper for a determination of the amounts of backpay due the above-named discriminatee, and the designation of liability for reinstatement and backpay.

On July 13, 1970, the Trial Examiner issued the attached Supplemental Decision finding that the discriminatee was entitled to reinstatement by the successor-employer as indicated and to the amounts of backpay therein set forth, and that the Respondents are jointly and severally liable for said backpay. Thereafter, each Respondent filed exceptions and a supporting brief,[4] and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National

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[3] *N.L.R.B. v. Golden State Bottling Company, Inc.*, 353 F.2d 667.

[4] Respondent, All American Beverages, Inc., filed a supplemental brief which we have considered as part of its original brief.

Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Supplemental Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings,* conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that Respondent Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento, and Respondent All American Beverages, Inc. d/b/a Pepsi-Cola Bottling Co. of Sacramento, Sacramento, California, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. January 21, 1971.

Edward B. Miller, Chairman
Gerald A. Brown, Member

*These findings are based, in part, upon credibility determinations of the Trial Examiner to which the Respondents have excepted. After careful review of the record, we conclude that these credibility findings are not contrary to the clear preponderance of all relevant evidence. Accordingly, we find no basis for disturbing these findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS
BOARD
(SEAL)

Opinion of the United States Court of Appeals for the Ninth Circuit.

The Opinion of the United States Court of Appeals for the Ninth Circuit is contained within the Appendix to the Petition for Writ of Certiorari, commencing on page 32 thereof.

Judgment.

The proposed Judgment of the United States Court of Appeals for the Ninth Circuit is contained within the Appendix to the Petition for Writ of Certiorari, commencing on page 37 thereof.

EXHIBIT 15(a).

AGREEMENT made January 31, 1968, by and between GOLDEN STATE BOTTLING CO., a California corporation doing business as "Pepsi-Cola Bottling Co. of Sacramento" (the "Seller") and SAM SNEAD ALL AMERICAN GOLF, INC., a Delaware corporation (the "Buyer").

The Seller is willing to sell to the Buyer, and the Buyer desires to purchase from the Seller certain of the assets and properties of the Seller as a going concern on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual agreements hereinafter set forth, the parties hereto agree as follows:

1. *Purchase and Sale.* On the terms and subject to the conditions set forth in this Agreement, the Seller hereby agrees to sell and deliver to Buyer, and Buyer agrees to purchase from the Seller, free and clear of all liens, charges and encumbrances, all of the assets and property owned by the Seller and used in the bottling business of the Seller ("said Bottling Business") conducted in Sacramento, California (other than the Retained Assets, as hereinafter defined), wherever located, real, personal or mixed, tangible or intangible, as the same shall exist on the Closing Date (as hereinafter defined) and all books and records relating to said Bottling Business of the Seller (collectively the "Purchased Assets"):

1.1 All of the real property relating to said Bottling Business and all of the right, title and interest of the Seller of every kind and description whatsoever in, or relating to, such real property (including leaseholds and easements of every

kind) including particularly, but not by way of limitation, the real estate of the Seller located at 1100 Q Street in the City of Sacramento, in the State of California, with all buildings, structures, fixtures and other improvements now erected upon or attached to said real estate (hereinafter collectively the "Real Estate").

1.2 All plant and office machinery, equipment, tools, furniture, furnishings, fixtures, appliances, vending machines, coolers, apparatus, automobiles, trucks, trailers, automotive accessories, repair parts, other transportation equipment, and other physical property relating to said Bottling Business, including without limitation all property described in Schedule A attached hereto and made a part hereof (hereinafter collectively the "Fixed Assets").

1.3 All raw materials, bottles, cans, cases, goods in process, product and syrup inventories, plant and office supplies, repair materials, and all other inventories and supplies wherever situated relating to said Bottling Business (hereinafter the "Inventories"), subject, however, to the rights of others to bottles and cases in the field.

1.4 All claims, demands, judgments, causes of action, rights, choses in action, insurance policies (other than life insurance or insurance relating to pension plans) including the cash surrender value thereof, agreements, leases, contracts, franchises, appointments, orders, commitments, claims, trademarks and trademark agreements, the name "Pepsi-Cola Bottling Co. of Sacramento" and other slogans or trade names relating to said Bottling Business, including without limitation bot-

tling and syrup appointments listed in Schedule B attached hereto and made a part hereof, and all operating data, books, records, customers lists relating to said Bottling Business and the business and good will of said Bottling Business as a going concern of the Seller (hereinafter the "Intangible Property").

1.5 All prepaid and deferred items, such as prepaid rentals, taxes, insurance and unbilled charges relating to said Bottling Business (hereinafter the "Prepaid Items").

From and after the Closing Date, all books, records and documents of the Seller acquired by the Buyer hereunder shall be available during regular business hours to the officers, attorneys, accountants and other authorized representatives of the Seller as may be reasonably necessary in connection with the business and affairs of the Seller prior to the Closing Date. The Buyer shall maintain and preserve all such books, records and other documents and shall not dispose of any of the same on or prior to December 31, 1972, without the prior written consent of the Seller.

All sales, transfer and documentary taxes, if any, in connection with the sale and delivery of the Purchased Assets hereunder shall be paid by the Seller.

2. *Purchase Price.* The purchase price payable by the Buyer to the Seller for the Purchased Assets shall be $1,600,000 payable as follows:

2.1 $450,000 to be paid in cash on the Closing Date.

2.2 $150,000 to be paid in cash on October 1, 1968.

2.3 $1,000,000 to be paid by the delivery on the Closing Date of a promissory note of the Buyer in form satisfactory to the Seller payable in sixty (60) equal consecutive monthly installments of principal of $16,666.66 each commencing February 1, 1973. Such note shall provide for interest at the rate of 6% per annum on the unpaid balance payable monthly commencing March 1, 1968. Such note will permit prepayment in whole or in part at any time after the first year following the date thereof, any such prepayment to be applied in inverse order of maturity. [G.C.] Such note will be secured by a deed of trust with respect to all of the Real Estate running to Transamerica Title Insurance Company. Such deed of trust will provide that the Buyer may demand a reconveyance to it of the property subject to the deed of trust, in the event the Buyer sells the Real Estate for at least $350,000 and agrees that the full proceeds from such sale will be applied to the prepayment of such note. Such note will also be secured by a Financing Statement and Security Agreement in form satisfactory to the Seller creating a first lien on the Fixed Assets. Such note will also be secured by a pledge with the Bank of Sacramento, Sacramento, California, of the franchises included in the Intangible Property, and such pledge shall be referred to in such Financing Statement and Security Agreement. Such pledge of such franchises will be subject to the approval of the transfer of such franchises by Pepsico, Inc. The Buyer understands that the Seller may assign its rights to such note and the documents securing

payment thereof to a bank to be selected by the Seller and agrees that in the event of such assignment, the Buyer will make all payments required by such note directly to the bank if so desired by the Seller. Such note shall provide that it will become immediately due and payable in the event the Buyer fails to make the payments when due under the agreements described in Section 12.6.

3. *Retained Assets.* The Seller shall not transfer but shall retain the following assets:

3.1 All cash and amounts on deposit with bank accounts.

3.2 All accounts and notes receivable.

3.3 The Chris Craft boat "Miss Pepsi".

3.4 All assets of Seller that do not relate to or are not used in said Bottling Business.

4. *Assumption of Certain Liabilities.* On the Closing Date, Buyer shall assume and agrees to perform and discharge the following obligations of Seller as they shall exist on the Closing Date:

4.1 Liabilities with respect to the Intangible Property.

4.2 Liabilities under conditional sales contracts or leases for equipment, including without limitation coolers and vending machines.

Except as expressly provided herein, Buyer shall not be obligated to assume or become liable for any obligations or liabilities of Seller, including, without limitation, any liability for vacation pay. The Seller shall pay as soon as possible all accrued vacation pay to January 31, 1968, directly to the employees in cash.

5. *Access to Plants, Properties and Records.* From and after the date of this Agreement, Seller shall afford to the officers, attorneys, accountants and other authorized representatives of Buyer free and full access to the plants, properties, books and records of Seller, in order that Buyer may have full opportunity to make such investigation as it shall desire to make of the affairs of Seller, provided that such investigation shall not unreasonably interfere with its operations.

6. *Continuance of Existing Plans.* The Buyer agrees to continue for the present time existing group life, Workmen's Compensation, product liability, health plans and other insurance coverage. The Buyer will not assume the Seller's Pension Plan, and the Seller will terminate the rights of all employees of the business being transferred pursuant to this Agreement under the Pension Plan as of January 31, 1968.

7. *The Closing.* The purchase and sale provided for in this Agreement (the "Closing") shall be made at the office of Messrs. Diepenbrock, Wulff & Plant, 455 Capital Mall, Sacramento, California, or at such other place as the parties shall mutually agree upon, at 11 a.m., on February 19, 1968, or on such other time and date as the parties shall mutually agree upon (the "Closing Date"). The Closing shall be effective as of the close of business on January 31, 1968. Said Bottling Business shall be operated for the benefit of the Buyer from and after the close of business on January 31, 1968. The Buyer shall receive the benefits of, or suffer the burden of, and shall reflect on its income tax returns for the period commencing with the close of business on January 31, 1968, any profit or loss of said Bottling Business from and after the close of business on January 31, 1968.

8. *Instruments of Transfer.* At the Closing on the Closing Date, Seller shall deliver to Buyer:

8.1 A grant deed or deeds to vest in Buyer good and marketable title to the Real Estate, free and clear of all liens and encumbrances other than rights, rights of way and easements of record heretofore disclosed to Buyer and the lien of current county and municipal taxes and municipal water charges not yet delinquent, together with a title report from Transamerica Title Insurance Company in form satisfactory to counsel for the Buyer.

8.2 Bills of sale with covenants of warranty, endorsements, assignments and other good and sufficient instruments of transfer, conveyance and assignment, in form satisfactory to Buyer, as shall be effective to vest in Buyer good and marketable title, free and clear of all liens and encumbrances to the Purchased Assets (other than the Real Estate), subject, however, to the rights of others with respect to bottles and cases in the field. The Buyer does not warrant the fitness, quality or usability of the Purchased Assets.

8.3 All of the documents relating to the Intangible Property, with consents to the assignment thereof where required.

Simultaneously with such delivery, Seller shall take all such steps as may be requisite to put Buyer in actual possession and operating control of the Purchased Assets.

9. *Certain Action by Seller.* Prior to the Closing, Seller will not, except with the prior written consent of Buyer:

9.1 Make any general wage or salary increases or enter into any employment contracts;

9.2 Mortgage, pledge, or subject to lien, or any other encumbrance, any of the Purchased Assets;

9.3 Lease or transfer any tangible assets, except in the ordinary course of business;

9.4 Sell, assign or transfer any licenses, patents, trademarks, trade names or other intangible assets;

9.5 Enter into any transaction or incur any obligations, other than in the ordinary course of business;

9.6 Waive or release any rights of a material value; or

9.7 Declare any dividend or make any payment or distribution to its shareholders or purchase or redeem any shares.

10. *Representations and Warranties of Seller.* Seller represents and warrants:

10.1 *Corporate Authority:* The execution and delivery to the Buyer of this Agreement, and the sale contemplated hereby, have been duly authorized by the Board of Directors and the stockholders of Seller at meetings duly called and held.

10.2 *Title to Properties:* Seller has or will have at or prior to the Closing Date good and marketable title in fee simple to all of the Real Estate, and owns outright all other properties and assets included among the Purchased Assets, except as otherwise provided in this Agreement; the Purchased Assets are free and clear of all liens and encumbrances other than rights, rights of way and easements of record heretofore disclosed to Buyer and the lien of current local taxes not yet delinquent, but subject to such minor defects in title

as are of a nature generally found in properties of similar character but which do not in any material way affect the marketability of the same or interfere with the operations of said Bottling Business. All plants and other buildings included among the Purchased Assets conform in all material respects to all applicable building and zoning laws, ordinances and regulations.

10.3 *Plants, Buildings, Machinery and Equipment:* All plants, buildings, machinery and equipment included among the Purchased Assets are in good operating condition, free from any known defects except such minor defects as do not interfere with the continued use thereof in the conduct of the normal operations of the Seller.

10.4 *Leases and Contracts:* There are no material leases, licenses, contracts or agreements relating to or affecting the business of the Seller or the Purchased Assets other than those set forth in Schedule B; all such leases, licenses, contracts and agreements are either assignable by Seller or proper consents to the assignment thereof will be obtained by Seller on or before the Closing; and Seller has complied with all the provisions of said leases, licenses, contracts and agreements and is not in default in any material respect under any of them.

10.5 *Litigation:* There are no actions, suits, proceedings or investigations pending against Seller, or to its knowledge threatened against it, that relate to or would adversely affect said Bottling Business.

11. *Representations and Warranties of Buyer.*

11.1 *Corporate Authority:* The execution and delivery to the Seller of this Agreement, and the

purchase contemplated hereby have been duly authorized by the Board of Directors of the Buyer at a meeting duly called and held.

12. *Conditions to Obligations of Buyer.* The obligations of Buyer under this Agreement are, at its option, subject to the fulfillment, on or before the Closing Date, of each of the following conditions precedent:

12.1 Between the date hereof and the Closing Date, the Seller shall have operated said Bottling Business only in the usual, regular and ordinary course of business, and shall have used its best efforts to preserve said Bottling Business intact in its present condition.

12.2 The Seller shall have maintained the Purchased Assets in customary repair, order and condition, reasonable wear and use excepted, and the Purchased Assets shall have suffered no substantial damage prior to the Closing Date whether by fire or other unavoidable casualty.

12.3 Seller shall have performed and complied with all terms, covenants and conditions required by this Agreement to be performed or complied with on or before the Closing Date.

12.4 The representations and warranties of Seller contained in this Agreement shall be true and correct as of the Closing Date with the same force and effect as though such representations and warranties had been made as of the Closing Date, except to the extent that such representations and warranties shall be incorrect as of the Closing Date because of events and changes (not materially adversely affecting the business of Seller or the Purchased Assets) occurring or arising after the date hereof in the ordinary course of business.

12.5 Seller shall have delivered to Buyer a certificate of its President or Vice President, dated the Closing Date, certifying as to the fulfillment of the conditions set forth in Sections 12.1 through 12.4.

12.6 E. J. Crofoot, C. E. Eeales and E. J. Crofoot, II shall each have entered an agreement with the Buyer whereby they each agree not to compete with said Bottling Business of the Buyer and to consult and otherwise assist the Buyer in the conduct of said Bottling Business for a period of ten years after the Closing Date in consideration of the payment by the Buyer to each of them at the rate of $50,000, $5,000 and $45,000, respectively.

12.7 E. G. Schilling, William Schilling and George Steres shall have agreed to be employed by the Buyer for a period of one year after the Closing Date as General Manager, Assistant General Manager and Production Manager, respectively, at monthly salaries of $1,500, $1,200 and $1,500, respectively.

12.8 Pepsi-Cola Company shall have agreed to the assignment and transfer by the Seller to the Buyer of all of the appointments and franchises included in the Purchased Assets and the pledge thereof as provided for in this Agreement.

13. *Conditions to Obligations of Seller.* The obligations of Seller under this Agreement are, at its option, subject to the fulfillment, on or before the Closing Date, of each of the following conditions precedent:

13.1 Buyer shall have performed and complied with all terms, covenants and conditions required by this Agreement to be performed or complied with on or before the Closing Date.

13.2 Buyer shall have delivered to Seller a certificate of its President or Vice President, dated the Closing Date, certifying as to the fulfillment of the conditions set forth in Section 13.1.

13.3 Narragansett Capital Corporation shall have subordinated all of the indebtedness of the Buyer to Narragansett Capital Corporation to any indebtedness of the Buyer to the Seller by a Subordination Agreement in form satisfactory to counsel for the Seller. It is understood that such Subordination Agreement shall permit the payment by the Buyer of interest when due on its indebtedness to Narragansett Capital Corporation so long as there shall be no default in connection with the indebtedness of the Buyer to the Seller. Narragansett Capital Corporation shall have appointed a local attorney for service of process in the State of California.

14. *Miscellaneous.*

14.1 Buyer and Seller each represents to the other that there are no claims for brokerage commissions or finders' fees in connection with the transactions contemplated by this Agreement, and Seller agrees to hold the Buyer harmless with respect to any such fees.

14.2 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

14.3 The representations and warranties of each of the parties and all agreements by them contained herein shall survive the Closing Date, and delivery of documents at that time pursuant to this Agreement.

14.4 The Buyer hereby waives compliance with the so-called Bulk Sales Act provisions of the Uniform Commercial Code.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

Attest:

/s/ Gene G. Schilling
Secretary

Attest:

/s/ C. P. Williamson
Ass't. Secretary

GOLDEN STATE BOTTLING CO.
/s/ By E. J. Crofoot

SAM SNEAD ALL AMERICAN GOLF, INC.
/s/ By Harry J. Sartes, Vice President

EXHIBIT 15B.

Instrument of Transfer and Assignment and Assumption of Liabilities.

KNOW ALL MEN BY THESE PRESENTS:

That GOLDEN STATE BOTTLING CO., a corporation organized and existing under the laws of the State of California (hereinafter called the "Seller"), for Ten Dollars ($10.00) and other valuable consideration to it paid by SAM SNEAD ALL AMERICAN GOLF, INC., a corporation organized and existing under the laws of said State of Delaware (hereinafter called the "Buyer"), the receipt whereof is hereby acknowledged by the Seller, has conveyed, granted, bargained, sold, transferred, set over, assigned, delivered and confirmed and by these presents does hereby convey, grant, bargain, sell, transfer, set over, assign, deliver and confirm unto the Buyer, its successors and assigns, forever, subject to all mortgages, liens, encumbrances, liabilities, obligations, charges and contingencies, if any, with respect thereto, all the assets and properties now owned by the Seller and used in its business of bottling Pepsi-Cola, wherever located, real, personal or mixed, tangible or intangible, as the same shall exist at the commencement of business on the effective date hereof, and all books and records relating to the business, specifically excluding any other assets or properties of the Seller not constituting part of or used in its business of bottling Pepsi-Cola, but including particularly (but without intending thereby in any manner to limit the foregoing general language) all the following assets and properties:

1.1. All the real property used in the business of the Seller and all the right, title, interest, estate and ap-

purtenances of the Seller of every kind and description whatsoever in, or in any way relating to, such real property (including leaseholds and chattels, real, easements and servitudes of every kind) and including particularly, but not by way of limitation, the real estate of the Seller located at 1100 Q Street in the City of Sacramento, California, with all buildings, structures, fixtures and other improvements now erected upon or attached to said real estate (hereinafter collectively "the Real Estate").

1.2. All plant and office machinery, equipment, tools, furniture, furnishings, fixtures, appliances, vending machines, coolers, apparatus, automobiles, trucks, trailers, automotive accessories, repair parts, other transportation equipment and other physical property owned by the Seller including without limitation all property described in Schedule A attached hereto and made a part hereof (hereinafter collectively "the Fixed Assets").

1.3. All raw materials, bottles, cans, cases, goods in process, product and syrup inventories, plant and office supplies, repair materials, and all other inventories and supplies, wherever situated (hereinafter "the Inventories").

1.4. All claims, demands, judgments, causes of action, rights, choses in action, insurance policies, including the cash surrender value thereof, all agreements, leases, contracts, franchises, appointments, orders, commitments, claims, trademarks and trademark agreements, the name "Pepsi-Cola Bottling Co. of Sacramento" and other slogans or trade names, including without limitation bottling and syrup appointments listed in Schedule B attached hereto and made a part hereof, and all operating data, books, records, custom-

ers lists, and the business and good will as a going concern of the Seller (hereinafter "the Intangible Property").

1.5 All prepaid and deferred items, such as prepaid rentals, taxes, insurance and unbilled charges (hereinafter the "Prepaid Items").

TO HAVE AND TO HOLD the same to the Buyer, its successors and assigns, forever, on the following terms:

The Seller agrees that, at any time and from time to time after the date hereof, it will, upon the request and at the expense of the Buyer, do, execute, acknowledge and deliver or will cause to be done, executed, acknowledged and delivered all such further acts, deeds, assignments, transfers, conveyances, powers of attorney and assurances as may be required for the better assigning, transferring, granting, conveying, assuring and confirming to the Buyer or for aiding and assisting in the collection of, or the reduction to possession, any or all of the assets and properties assigned, transferred, conveyed and delivered, or to be assigned, transferred, conveyed and delivered, to the Buyer hereunder.

The Seller hereby names and irrevocably constitutes and appoints the Buyer, its successors and assigns, the true and lawful attorney or attorneys of the Seller, with full power of substitution, in the name of the Buyer or in the name of the Seller but on behalf of and for the benefit and at the expense of the Buyer, its successors and assigns, to demand and receive from time to time any and all assets and properties hereby assigned, transferred, conveyed and delivered to the Buyer; to give receipts, releases and acquittances for and in respect of the same or any part thereof; to

collect, for the account of the Buyer all receivables and other items transferred to the Buyer as provided herein, and to endorse with the name of the Seller any checks received on account of any such receivables or other items; from time to time to institute and prosecute, in the name of the Seller or otherwise but at the expense and for the benefit of the Buyer, its successors and assigns, any and all proceedings at law, in equity or otherwise which the Buyer, its successors or assigns, may deem proper in order to collect, assert or enforce any claim, right, title or interest of any kind in or to the assets or properties hereby assigned, transferred, conveyed and delivered, or intended so to be, to defend or compromise any and all actions, suits or proceedings in respect of any of said assets or properties and to do all such acts and things in relation thereto as the Buyer, its successors or assigns, shall deem desirable. The Seller hereby declares that the foregoing powers are coupled with an interest and are and shall be irrevocable by the Seller or by its dissolution or in any manner or for any reason. The Seller hereby authorizes the Buyer to retain for its own account any amounts collected pursuant to the foregoing powers, including any sums payable as interest in respect thereof, and the Seller hereby agrees to hold for the benefit of and to pay to the Buyer any amounts which shall be received by the Seller in respect of any receivables or other items transferred to the Buyer as provided herein. The Seller hereby further agrees to cooperate with the Buyer upon the request and at the expense of the Buyer, in the preparation and prosecution of any such claims.

Nothing in this instrument shall be construed as an attempt to assign (a) any contract which is in law

nonassignable without the consent of the other party or parties thereto, unless such consent shall have been given or (b) any contract or claim as to which all the remedies for the enforcement thereof enjoyed by the Seller would not, as a matter of law, pass to the Buyer as an incident of the assignments made hereby until the Buyer shall in writing have notified the Seller of its desire that this instrument operate as an assignment of such contract or claim. In order, however, that the full value of every contract and claim of the character described in clauses (a) and (b) of the next preceding sentence and all claims and demands on such contracts may be realized for the benefit of the Buyer, the Seller hereby covenants with the Buyer that it will, by itself or by its agents, at the request and expense and under the direction of the Buyer, in the name of the Seller or otherwise as the Buyer shall specify and as shall be permitted by law, take all such action and do or cause to be done all such things as shall in the opinion of the Buyer be necessary or proper (i) in order that the obligations of the Seller under such contracts may be performed in such manner that the value of such contracts shall be preserved and shall inure to the benefit of the Buyer and (ii) for, and to facilitate, the collection of the moneys due and payable, and to become due and payable, to the Seller in and under every such contract and claim and in respect of every such claim and demand; and the Seller hereby covenants promptly to pay over to the Buyer all moneys collected by or paid to it in respect of every such contract, claim or demand.

And the Buyer, in consideration of the covenants of the Seller hereinbefore contained and other valuable considerations to it paid by the Seller,—the receipt

of which is hereby acknowledged,—for itself and for its successors and assigns, does hereby covenant and agree with the Seller, its successors and assigns, that it, the Buyer, will assume, undertake, pay, satisfy, discharge and perform those legally enforceable debts, liabilities, obligations and contracts of every kind of the Seller outstanding at the commencement of business on the effective date hereof and as specifically set forth in Schedule X attached hereto and made a part hereof, and will indemnify, save harmless and exonerate the Seller, its successors and assigns, from and against all actions, claims and demands in respect thereto.

Regardless of the generality of the foregoing assignment, the Seller shall not transfer but shall retain the following assets:

All cash and amounts on deposit with bank accounts.

All accounts and notes receivable.

The Chris Craft boat "Miss Pepsi".

All assets of Seller that do not relate to or are not used in said Bottling Business.

Item 1.3 of this agreement is subject to the rights of others to bottles and cases in the field.

This instrument shall be effective at the commencement of business on February ...., 1968, and shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF on the 19th day of February, 1968, Golden State Bottling Co. and Sam Snead All American Golf, Inc., have caused these presents and one counterpart hereof to be executed in their respective names and behalf by their respective officers, thereunto duly authorized, and their respective corporate

seals to be hereunto and to said counterpart affixed by their respective officers, thereunto duly authorized.

GOLDEN STATE BOTTLING CO. (Seller)

By .....

SAM SNEAD ALL AMERICAN GOLF, INC. (Buyer)

By .....

State of California, County of .....

In Sacramento on the ..... day of February, 1968, before me personally appeared the above-named ..... the ..... of Golden State Bottling Co., to me known and known by me to be the person executing the foregoing instrument for and in behalf of said corporation, and he acknowledged said instrument by him executed to be his free act and deed in his said capacity and the free act and deed of said corporation.

(Notary Public)

State of California, County of Sacramento.

In Sacramento on the ..... day of February, 1968, before me personally appeared the above named Harvey J. Sarles, the Vice President of Sam Snead All American Golf, Inc. to me known and known by me to be the person executing the foregoing instrument for and in behalf of said corporation and he acknowledged said instrument by him executed to be his free act and deed in his said capacity and the free act and deed of said corporation.

(Notary Public)

EXHIBIT 15C.

SCHEDULE X.

(Bill of Sale).

Agreement between Golden State Bottling Co. of Sacramento, (Seller) and Sam Snead All American Golf, Inc. (Buyer), made as of January 31, 1968.

LIABILITIES TO BE ASSUMED BY BUYER

Payable to Pepsi-Cola Equipment Corporation:	
Conditional Sales Contracts for fountain and vending equipment and related parts—total owed by seller, less portion to be paid by seller ($4,719.10)	$16,260.00
Lease agreement for fountain and vending equipment and related parts:	
Total owed by seller, less portion to be paid by seller, ($3,131.85)	$13,376.21
Conditional Sales Contracts for Visa Coolers:	$34,601.85
Sub Total	$64,238.06
Office Equipment purchase contracts:—	
$13.89 per month for 12 months	166.68
$83.25 per month for 25 months	$ 2,081.25
	$66,485.99

RESPONDENT'S EXHIBIT 4.

Pepsi-Cola Bottling Co. of Sacramento
1100 Q Street, Sacramento, California 95814
Telephone: 444-7134

To Whom it may Concern:

Pursuant to #29 of the Distributors Agreements between the undersigned distributors and the "Bottler" Pepsi Cola Bottling Co. of Sacramento, we individually hereby consent to the assignment of the agreements by the Bottler, to Sam Snead All American Golf, Inc.. D.B.A. Pepsi Cola Bottling Co. of Sacramento.

Dale Flemmer /s/ Dale Flemmer

Bob Foster /s/ Robert Foster

Doug Fusco /s/ Douglas A. Fusco

Don Glavich /s/ Donald Glavich

Cliff Harwood /s/ Clifford Harwood

Myrel McHann /s/ Myrel L. McHann

Jerry Miller /s/ Jerry Miller

Dave Murray /s/ Dave Murray

Jeff Sampo /s/ Jeff P. Sampo

Don Thorne /s/ Donald R. Thorne

John Whisler /s/ John Whisler

Feb. 19th, 1968

EXHIBIT 19.

Golden State Bottling Company
1100 "Q" Street
Sacramento, California

November 14, 1968

William B. Luck, Esq.
Clerk of the United States Court
of Appeals for the Ninth Circuit
P. O. Box 547
San Francisco, California

Re: No. 19,803—NLRB vs. Golden State Bottling Company, Inc., d/b/a Pepsi Cola Bottling Company of Sacramento (C.A. 9) Board Case No. 20-CA-2656

Dear Sir:

Pursuant to earlier advices through our counsel, Hodge, Jackson, Kumler & Croskey, we enclose herewith the original and three copies of an executed Substitution of Attorneys in the above matter. Also enclosed is an Affidavit of Service by Mail.

Yours very truly,
GENE SCHILLING
General Manager

GS:ek

cc: Marcel Mallet-Prevost, Esq.
Assistant General Counsel
National Labor Relations Board
Washington, D. C. 20570

Roy O. Hoffman, Director
Region 20 NLRB
450 Golden Gate Ave. Box 36047
San Francisco, California 36003
Le Prohn & LeProhn [sic]
315 Montgomery Street
San Francisco, California

Substitution of Attorneys.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento, Respondent. No. 19,-803.

Respondent GOLDEN STATE BOTTLING COMPANY, INC. d/b/a PEPSI-COLA BOTTLING COMPANY OF CALIFORNIA, hereby substitutes HODGE, JACKSON, KUMLER & CROSKEY, 1901 Avenue of the Stars, Suite 1651, Los Angeles, California, 90067, Telephone 277-0200, as attorneys of record in place and stead of HILL, FARRER & BURRILL, 445 South Figueroa Street, Los Angeles, California.

Dated: November 14, 1968.

GOLDEN STATE BOTTLING COMPANY, INC.
d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO
By /s/ Gene G. Schilling

I consent to the above substitution.

Dated: November 11, 1968.

HILL, FARRER & BURRILL
By /s/ Kyle D. Brown

Above Substitution accepted.

Dated: November 13, 1968.

HODGE, JACKSON, KUMLER & CROSKEY
By /s/ M. B. Jackson

[Affidavit of Service Omitted in Printing]

EXHIBIT 16A.

November 18, 1969

Mr. Gene G. Schilling, President
Pepsi-Cola Bottling Company
1100 Que [sic] Street
Sacramento, California 95814

Re: Pepsi-Cola Bottling Company
Case No. 20-CA-2656

Dear Mr. Schilling:

Your attorney, Mr. Jackson, has advised me to contact you for details of the sale of the Pepsi-Cola Bottling Company in February 1968. As you are aware, this office had assumed until quite recently that the business continued to be owned by Golden State Bottling Company, Inc. In order to clarify the existing situation in regard to possible liability for backpay, I would like a copy of the purchase agreement under which the asset sale of February 1968 was made. In addition, and for the same purpose, I would appreciate your answering the following questions:

(1) At the time of the asset sale, were normal business operations interrupted for any period of time?

(2) Did the new owners continue to do business with the same customers?

(3) Did the new owners retain all of the same employees employed by Golden State? If not, how many old employees were retained and how many new employees were hired? When were the new employees hired?

(4) What supervisory and managerial personnel were retained by the new owners? How many new supervisors were hired and when?

(5) How many corporate officers of Golden State assumed positions with the new owners? What positions?

I would greatly appreciate it if you could provide me with this information as soon as possible. I am sure you share my desire to bring this matter to an early and final determination. Thank you for your cooperation.

Very truly yours,
Douglas H. Barton
Attorney

cc: Morton B. Jackson, Esq.
Hodge, Jackson, Kimbler [sic] & Croskey
1901 Avenue of the Stars, Suite 1651
Los Angeles, California 90067

EXHIBIT 16B.

Pepsi-Cola Bottling Company/Sacramento
1100 Que Street—Sacramento, California 95814
Telephone (916) 444-7134

November 28, 1969

Mr. Douglas H. Barton
450 Golden Gate Ave., Box 36047
San Francisco, California 94102

Dear Mr. Barton:

Enclosed is a copy of the purchase agreement covering the asset sale of the Pepsi-Cola Bottling Co. by Golden State Bottling Co.

In answer to your questions:

(1) Normal business operations were not interrupted.

(2) We did continue to do business with the same customers.

(3) All employees were retained with the exception of two that were not needed and one that was not satisfactory. The one replacement was accomplished on February 1, 1969.

(4) All supervisory and managerial personnel were retained and no new supervisors were hired.

(5) One corporate officer assumed a position with the new owners. Gene G. Schilling as President of this division.

I apologize for this information being so slow in reaching you, but I have been away from my desk and just now returned.

Very truly yours,
/s/ Gene G. Schilling
Gene G. Schilling,
President

GGS/de
Enclosure
cc: Morton B. Jackson, Esq.

EXHIBIT 20.

December 9, 1968

Golden State Bottling Co., Inc. d/b/a
Pepsi-Cola Bottling Company of Sacramento
1100 "Q" Street
Sacramento, California

Re: Golden State Bottling Co., Inc., d/b/a
Pepsi-Cola Bottling Company of Sacramento
Case No. 20-CA-2656

Gentlemen:

After consulting your attorney, Mr. Morton B. Jackson, I am enclosing copies of the Notice to All Employees for signing and posting at your establishments in accordance with the terms of the Decree of the United States Court of Appeals.

Please also return to this office one signed and dated copy of this Notice. Please also complete and return one copy of the enclosed Certificate of Posting.

You will note that the Court Decree calls for an offer of reinstatement to Kenneth L. Baker. I suggest that this offer be made in writing. Please mail this office a copy of the offer and later inform us of the response made to the offer. I understand that Mr. Jackson will be in touch with you about this. Mr. Baker's address is 6633 Dawson Way, Sacramento, California.

A Board Agent will visit your premises during the 60-day posting period to verify that the Notice is properly posted.

If there are any questions regarding the above, please do not hesitate to call or write me.

Very truly yours,
M. C. Dempster
Compliance Officer

Enclosures

cc: Attn. Mr. Jim Dyar
Teamsters 150
2525 Stockton Blvd., Sacramento

cc: Morton B. Jackson, Esq.
1901 Avenue of the Stars, Suite 1651
Los Angeles, California 90067

cc: P.C.B.C.E., Inc.
Attn: Mr. James Steen, Pres.
6817 Mira Court
Sacramento, California

cc: Allan B. O'Connor, Esq.
Luther & O'Connor
950 Fulton Avenue
Sacramento, California

cc: Edward J. Farrell
3515 Broadway
Sacramento, California

cc: LeProhn & LeProhn
315 Montgomery Street
San Francisco, California

cc: Kenneth L. Baker
6633 Dawson Way
Sacramento, California

Petitioners Exhibit 1.

December 11, 1968

Mr. Kenneth L. Baker
6633 Dawson Way
Sacramento, California

Dear Mr. Baker:

We hereby offer to re-instate you to the former, or substantially equivalent position—namely a route driver, that you once had with the Pepsi-Cola Bottling Company. The pay scale is $145.43 per week, and is not entitled to overtime.

Kindly notify us immediately if you wish to accept this position. We will keep the offer open for five days. In the event that we do not hear from you by the close of business on Tuesday, December 17, 1968, we will make other arrangements.

Yours very truly,
PEPSI-COLA BOTTLING CO.
Gene G. Schilling
President

GGS:cw

cc: Morton B. Jackson, Esq.
1901 Avenue of the Stars
Los Angeles, California 90067

cc: M. C. Dempster
450 Golden Gate Ave. Box 35047
San Francisco, California 94102

EXHIBIT 21A.

Certificate of Posting.

NATIONAL LABOR RELATIONS BOARD
Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

PLEASE RETURN THIS CERTIFICATE, DULY SIGNED AND WITNESSED, TO THE NATIONAL LABOR RELATIONS BOARD. ALSO, PLEASE RETURN A COPY OF THE NOTICE, SIGNED AND DATED LIKE THE POSTED COPY, OR COPIES.

Re: Golden State Bottling Company, Inc. d/b/a
Pepsi-Cola Bottling Company of Sacramento
Case No 20-CA-2656

The undersigned hereby states that a copy or copies of the Notice required to be posted in the above-entitled case, were posted by me, personally, in the following places: (List below the place or places where copies were posted.)

Posted: 11 day of December 1968

1. Employees Bulletin Board

/s/ Gene G. Schilling
/s/ Gene G. Schilling
/s/ President
/s/ Billie J. Linker
(Witness)

EXHIBIT 21B.

NOTICE TO ALL EMPLOYEES PURSUANT TO

A Judgment of the United States Court of Appeals Enforcing in part and denying in part an Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act (as amended) we hereby notify our employees that:

WE WILL NOT interfere with the administration of P.C.B.C.E., Inc., or any other labor organization by suggesting to the employee members thereof that they elect new officers.

WE WILL NOT bargain collectively with persons other than the authorized bargaining committee of P.C.B.C.E., Inc., so long as P.C.B.C.E., Inc. is and remains the acknowledged majority representative of the employees for collective bargaining purposes.

WE WILL NOT discharge, or otherwise discriminate in respect to the hire and tenure of employment of any employee for the purpose of discouraging activity on behalf of P.C.B.C.E., Inc., or CHAUFFEURS, TEAMSTERS & HELPERS, LOCAL 150, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their

right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer to KENNETH L. BAKER immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of pay resulting from the discrimination against him.

GOLDEN STATE BOTTLING COMPANY, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO
(Employer)

Dated Dec. 11, 1968.

By Gene G. Schilling (Title) President.

NOTE: We will notify Kenneth L. Baker if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102. Telephone (415) 556-0335.

PETITIONERS' EXHIBIT 18A.

Pepsi-Cola Bottling Company / Sacramento
1100 Que Street, Sacramento, California 95814
Telephone (916) 444-7134

January 22, 1969

Mr. M. G. Dempster
450 Golden Gate Avenue
Box 36047
San Francisco, Calif. 94102

Dear Mr. Demptster:

Thank you for being so patient.

As I explained on the phone, our 1962 payroll records were lost in the fire at our plant. However, this is our base pay schedule for route salesmen from June of 1962 to the present date.

June 1962 $115.00

April 1963 raised to $118.00 per week

April 1964 raised to $123.00 per week

April 1965 raised to $128.00 per week

April 1966 raised to $133.00 per week

April 1967 raised to $138.50 per week

April 1968 raised to $145.43 per week

Also enclosed is a commission schedule of all route salesman starting with the last quarter of 1962 through the last quarter of 1968. This schedule shows the starting and terminating date of all route salesmen and the total route salesmen commission paid by quarters.

I trust this information is satisfactory. However, If I may be of any further service, please advice me.

Sincerely

PEPSI-COLA BOTTLING CO.

/s/ Gene G. Schilling

Gene G. Schilling

President

GS/JL

Enclosure

EXHIBIT 2.

APPENDIX B

QUARTERLY GROSS BACKPAY[1] PRIOR TO CREATION OF DISTRIBUTORSHIPS

QUARTER			
1963-3rd[2]	Base pay (5 2/5 weeks X $118/wk.)		$537
	Commissions (from Appendix A)		33
	Uniforms		8
		Total	$678
1963-4th	Base pay (13 weeks X $118/wk.)		$1,534
	Commissions (from Appendix A)		15
	Uniforms		8
	Christmas bonus		45
		Total	$1,602
1964-1st	Base pay (13 weeks X $118/wk.)		$1,534
	Commissions (from Appendix A)		40
	Uniforms		8
		Total	$1,582
1964-2nd	Base pay (13 weeks X $123/wk.)		$1,599
	Commissions		22
	Uniforms		8
		Total	$1,629
1964-3rd	Base pay (13 weeks X $123/wk.)		$1,599
	Commissions		115
	Uniforms		8
		Total	$1,722

[1]Amounts rounded off to closest dollar amount.
[2]From August 24 through September 30.

EXHIBIT 3.

APPENDIX C-1

Computation of Baker's gross backpay[1] from October 1, 1964 through December 31, 1968, based on the distribution of Thorne's earnings by calendar quarters.

QUARTER	No. of Cases Sold[2]	Percentage by Quarters[3]	Gross Backpay[4]
1964-4th	12.0	100%	$2,700
Total 1964	12.0	100%	$2,700
1965-1st	11.3	21.1	$2,412
-2nd	13.7	25.6	2,927
-3rd	15.3	28.6	3,269
-4th	13.2	24.7	2,824
Total 1965	53.5	100%	$11,432
1966-1st	13.2	23.4	$2,838
-2nd	14.9	26.4	3,201
-3rd	15.7	27.7	3,359
-4th	12.7	22.5	2,728
Total 1966	56.5	100%	$12,126
1967-1st	13.3	22.9	$2,708
-2nd	14.9	25.6	3,027
-3rd	16.7	28.8	3,406
-4th	13.2	22.7	2,685
Total 1967	58.1	100%	$11,826
1968-1st	14.5	21.7	$3,081
-2nd	18.3	27.4	3,891
-3rd	19.2	28.7	4,076
-4th	14.8	22.2	3,153
Total 1968	66.8	100%	$14,201

[1]Amounts rounded off to closest dollar amount.

[2]In 100's.

[3]Cases sold in quarter divided by total cases sold in year.

[4]Annual earnings multiplied by percentage of cases sold each quarter.

EXHIBIT 24.

APPENDIX C-2

Computation of Baker's estimated gross backpay[1] from January 1, 1969 through June 30, 1969 based on an average of Thorne's earnings for corresponding quarters in calendar years 1965 through 1968.

1969-1st Quarter	
1965-1st	$2412
1966-1st	2838
1967-1st	2708
1968-1st	3081
TOTAL	$11,039 ÷ 4 Quarters = $2,760

1969-2nd Quarter	
1959-2nd	$2927
1966-2nd	3201
1967-2nd	3027
1968-2nd	3891
TOTAL	$13,046 ÷ 4 Quarters = $3,262

[1]Amounts rounded off to closest dollar amount.

EXHIBIT 4.

APPENDIX E-1

Baker's Net Backpay through December 30, 1968

Quarter	Gross[1] Backpay	Net Interim[2] Earnings	Net[3] Backpay
1963-3rd	678	659	19
1963-4th	1602	1630	—
1964-1st	1582	1526	56
1964-2nd	1629	1619	10
1964-3rd	1722	1635	87
1964-4th	2700	2101	599
1965-1st	2412	1586	826
1965-2nd	2927	1621	1306
1965-3rd	3269	2056	1213
1965-4th	2824	2096	728
1966-1st	2838	1660	1178
1966-2nd	3201	1800	1401
1966-3rd	3359	2388	971
1966-4th	2728	2280	448
1967-1st	2708	1755	953
1967-2nd	3027	2015	1012
1967-3rd	3406	2087	1319
1967-4th	2685	2512	173
1968-1st	3081	2080	1001
1968-2nd	3891	2450	1441
1968-3rd	4076	2551	1525
1968-4th	3153	2917	236
		TOTAL	$16,502

[1]From Appendices B and C.
[2]From Appendix D.
[3]Gross backpay less net interim earnings.

EXHIBIT 25.

APPENDIX E-2

Baker's estimated backpay from January 1, 1969 through June 30, 1969.

QUARTER	Gross Backpay[1]	Net Interim Earnings[2]	Net Backpay[3]
1969-1st	$2,760	$2,275	$485
1969-2nd	3,262	2,905	357
			$842

[1]From Appendix C-2.
[2]From Appendix D.
[3]Gross backpay less net interim earnings.

EXHIBIT 5.

EXHIBIT 18R

3rd Quarter 1967	4th Quarter 1967	1st Quarter 1968	2nd Quarter 1968	3rd Quarter 1968	4th Qua 19

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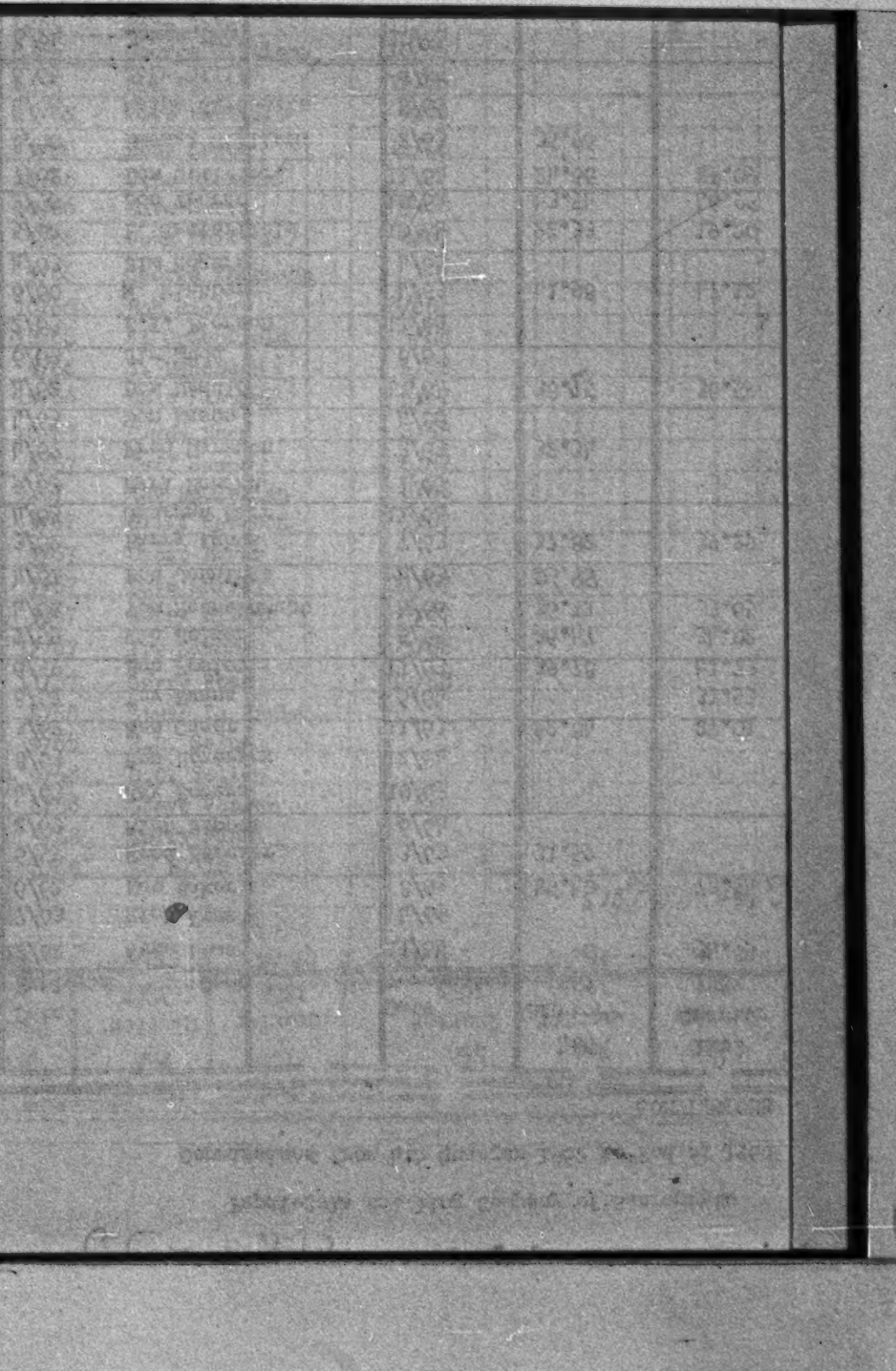

Before the National Labor Relations Board
Twentieth Region

In the Matter of: Golden State Bottling Company, Inc. d/b/a Pepsi-Cola Bottling Company of Sacramento and All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Co. of Sacramento and Edward J. Farrell, An Individual and P.C.B.C.E., Inc., Party to the Contract. Case No. 20-CA-2656.

February 3, 1970
Federal Building
Courtroom No. 3 (Room 2407)
650 Capitol Mall
Sacramento, California

BEFORE:

ROBERT PIPER, Trial Examiner.

APPEARANCES:

DOUGLAS BARTON, Esq.,
450 Golden Gate Avenue,
San Francisco, California,
appearing as counsel for the
General Counsel, National
Labor Relations Board

JACKSON, [KUMLER]*
COPES & CROSKEY,

*The bracketed language followed by an asterisk represents corrections to the Transcript ordered by the Trial Examiner in Appendix A to his Supplemental Decision as set forth in the Petition for Certiorari, Appendix A.

by

MORTON B. JACKSON, Esq.

1901 Avenue of the Stars,
Los Angeles, California
90067, appearing on behalf
of Respondent. [1]

* * *

Q. (By Mr. Barton) During the calendar year 1965, Mr. Williams, were you employed as a distributor for Pepsi Cola Bottling Company of Sacramento?

MR. JACKSON: Objection, Mr. Trial Examiner.

Perhaps I can state an objection: First, we object to the line of testimony. We object to the characterization of it as an employment, as assuming something not in evidence.

But we object to the relevancy and pertinency of any testimony of distributors concerning distributorship earnings at this time. We have indicated that the present circumstances we have no objection to this man being put on out of order, but if it may be understood that there is a general objection running to his testimony, then, perhaps we can proceed.

But I do object to the characterization of the relationship of one of employment.

TRIAL EXAMINER: We might as well cross that bridge now. What is your position with respect to that, Mr. Barton? [34]

MR. BARTON: Our position will be that whether or not these individuals were independent contractors is really irrelevant insofar as the standpoint of remedy for Mr. Baker's discharge is concerned. We would certainly concede that if Mr. Baker has been an inde-

pendent contractor at the time of his discharge, there would have been [No]* violation but since there is no such contention, our position is that it is really [not]* relevant. We are talking about remedy here, not the scope of violation.

TRIAL EXAMINER: Well, do you intend to offer proof to the effect that if Mr. Baker had continued in his employment he would have become necessarily—necessarily have become a distributor?

MR. BARTON: Yes, we do. [35]

* * *

EDWIN JOHN CROFOOT

was called as a witness by and on behalf of the General Counsel and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Barton) Would you spell your name for the record, please, Mr. Crofoot.

A. Edwin John Crofoot, C-r-o-f-o-o-t.

Q. What is your present address? [43]

A. 3541 Whitney Avenue, Sacramento.

Q. And you hold a position with Golden State Bottling Company, do you not?

A. Yes.

Q. What is that position?

A. President.

Q. How long have you been president?

A. Since 1962.

Q. And you also own a portion of the stock of Golden State Bottling Company, do you not?

A. Yes, sir.

Q. Approximately what percent do you own?

A. A very small percentage, 15 shares out of 650.

Q. I see. What are your responsibilities at Golden State, Mr. [Crofoot]*?

A. I am President and General Manager.

Q. Are you its chief executive officer?

A. Yes, sir.

MR. BARTON: I will propose to examine him under Rule 43(b), your Honor.

TRIAL EXAMINER: All right.

Q. (By Mr. Barton) Now, at one time your corporation owned and operated a bottling company here in Sacramento, did it not?

A. Yes, sir. [44]

Q. And that was the Pepsi Cola Bottling Company; is that right?

A. Yes, sir.

Q. That was a franchise, is that correct?

A. Yes, sir.

Q. Were you actively involved in the management of that bottling company, Mr. [Crofoot]?

A. Yes, sir.

Q. Who is the person immediately below you in the chain of command?

A. May I, sir,—at one time you referred—

Q. Well, let's take it from the beginning of '63 to the time of the sale.

A. Mr. Cliff Field and my son E. J. Krofoot, II. [sic]

Q. All right. And were they actively involved in the management of the bottling company?

A. Yes, sir.

Q. Who was in charge of the day-to-day operations?

A. Mr. Gene Schilling.

Q. What was his title?

A. Manager.

Q. How often would you confer with Mr. Schilling regarding the operation of the bottling company?

A. Very regularly.

Q. How often a week or a month, if you could give me that? [45]

TRIAL EXAMINER: Daily?

THE WITNESS: Yes, almost daily.

Q. (By Mr. Barton) Did you have an office at the plant?

A. I did, sir, until September of 1966, at which time we had a fire and my office burned.

Q. And would you come to your office every day?

A. Not every day, but very regularly.

Q. How often a week?

A. Well, four or five times. Three to five times.

Q. And to what extent did Mr. Schilling have authority to undertake transactions and carry on business without authorization from you?

A. Well, in a day-to-day run of the business he had full authority.

Q. I see. Did he have the authority to bind the corporation, assume debts, this kind of thing?

A. No, sir.

Q. He did not.

Did he have the authority to initiate legal proceedings?

A. No, sir.

Q. If legal proceedings were initiated against the bottling plant, or it was necessary to pursue litigation in the course of operation of this bottling plant, did he have the authority to undertake such proceedings? Initiate them himself? [46]

A. No, sir.

Q. He would have to consult with you on such occasion?

A. Yes, sir.

Q. And if proceedings were filed against the bottling company, that is the same?

A. Yes, sir.

Q. He would have to consult with you.

And once such proceedings had been filed and it became a question of whether or not you were going to settle rather than going to court, he would have to consult with you on that decision; is that correct?

A. Yes, sir.

Q. Now, one such occasion on which Mr. Schilling consulted you concerned the line or the difficulties you were having in 1963, did it not?

A. I don't specifically recall that he did.

Q. I see. Did he not on the occasion when the men left the plant and refused to sign the contract and he denied them entrance to the plant, were you present on that occasion?

A. Not that I recall, sir.

Q. But you were consulted about the problems arising from that difficulty?

A. I knew of them at that time. It's so long ago, I don't recall a specific instance. [47]

Q. And when the bottling plant corporation became involved in legal proceedings arising from these labor difficulties, did he consult with you regarding the progress of those proceedings?

A. I don't recall any specific instance, no, sir.

Q. I see. Did you participate in decisions regarding obtaining counsel in pursuit of those proceedings?

A. Not directly, no, sir.

Q. Mr. Schilling did?

A. No, sir, the Bottling Association did.

Q. I see.

Following the conclusion of that—

Oh, incidentally, when expenditures come in pursuant to these, such as these legal proceedings, does Mr. Schilling have the authority to make payment or does he consult with you?

A. He had authority with someone else signing the check.

Q. Who would sign the check?

A. Either myself or my son or C. E. Eales. [48]

* * *

Witness—Crofoot

Q. (By Mr. Barton) I understood from your previous testimony that Mr. Schilling had no authority to initiate legal proceedings or to settle them or to make decisions as to the course of these proceedings, is that correct?

A. Sir, no, not completely. Mr. Schilling represented us [49] at the Bottlers Association and the proceedings that would be taken there he would have authority to proceed with them.

Q. I see. So he wouldn't need to consult with you in that aspect of the job at all?

A. Not in connection with that, no, sir.

Q. During the course of the same period you had labor negotiations, is that correct, with the P.C.B.C., Inc., the Union that was representing the employers at the time?

A. No, sir.

Q. He didn't consult with you at any time regarding them?

A. I believe he did, but I am not completely familiar with the details.

Q. So Mr. Schilling consulted with you, but by in large he assumed these responsibilities himself?

A. That is correct, sir.

Q. Had you specifically delegated all authority to him in labor relations matters?

A. No.

Q. What had you told him in that respect?

A. I don't think there was any specific instructions in connection with it. He was designated as I recollect as our representative on the Board of Directors of the Bottlers Association.

TRIAL EXAMINER: Do I understand the Bottlers Association handled the collective bargaining? [50]

THE WITNESS: Yes, sir.

TRIAL EXAMINER: On behalf of more than your company, then, I take it?

THE WITNESS: Yes, sir.

Q. (By Mr. Barton) Did not Mr. Schilling engage in independent negotiations with this particular union?

A. I can't answer that, sir. I don't know. At least I did not. I do not remember.

Q. I see. Now, in regard to the unfair labor practice proceedings which developed from that, these labor difficulties, were you advised of the initial hearing in that case which took place in August of '63?

A. Not verbally.

Q. Were you informed that the company lost that?

A. No, sir.

Q. Were you informed of a decision to pursue the matter in the courts?

A. No, sir.

Q. Mr. Schilling never mentioned that?

A. Not that I specifically recall. It is very possible he did. It's a long time ago and I haven't that good a memory.

Q. And you had no knowledge of the legal expenses which the company was incurring pursuant to these legal proceedings, is that correct? [51]

A. Yes, sir, I did.

MR. JACKSON: Now just a moment. I object to that as assuming something not in evidence. There is no evidence the company assumed any legal expenses.

MR. BARTON: I will withdraw the question.

Q. (By Mr. Barton) Were you aware of any legal expenses being incurred by the company in these legal proceedings?

A. I knew we contributed to the Bottlers' Association for attorney's fees, yes, sir.

Q. Did you sign checks for that?

A. I may very well have.

Q. I see. Now, directing your attention to the month of December 1965, did you receive knowledge of the Ninth Circuit Decree in the case involving your company?

A. Not that I recall at this time.

Q. Did you ever receive information that the company had lost that proceeding?

A. Not that I recall. I may have.

Q. To your recollection when did you first—I assume you know now in part, at least, the matter involving Ken Baker, you are involved with this now.

And I take it you are informed now that the Ninth Circuit Decree was adverse to the company insofar as it related to the discharge of Ken Baker?

A. I understand that is true now, yes, sir. [52]

Q. And to your knowledge, when did you first learn of this?

A. That it was a court proceeding? This morning.

Q. You didn't know about it until this morning?

A. Not that I recall. I knew there was some difficulty, but I did not know it had been in the courts.
Q. Tell me this, Mr. [Crofoot]*: When you are writing your checks, payments of expenditure, when you were doing this during the period in which you were operating this bottling plant, did you ever raise any questions as to what the expenditure was for, or would you just sign them as a matter of course?
A. No, I raise questions on occasions.
Q. If expenses came in which seemed to be overly large, unduly large, you would ask a question about it; is that right?
A. Yes, sir.
Q. I take it from your answer regarding the lack of knowledge concerning the court decree, you also until this morning were unaware of the final court decree in the month of December 1968 relating to this case; is that correct?
A. Yes, sir.
Q. You had no knowledge? You didn't know the company lost that proceeding?
A. I knew they had a—lost a proceeding; I did not know [53] it was a court proceeding.
Q. You knew they lost a court proceeding; you knew it related to Ken Baker?
A. Yes, sir, I did.
Q. You knew that as of '68?

TRIAL EXAMINER: What was that earlier court decree you were referring to or court order?

MR. BARTON: Initially there was a decree in December of '65, your Honor, and there was various motions to reconsider and motions to reconsider the reconsideration which consumed about three years until the final decree was settled in '68.

TRIAL EXAMINER: Did you gentlemen both participate in the original proceedings?

MR. BARTON: I did not.

MR. JACKSON: I did.

Q. (By Mr. Barton) Mr. Krofoot, during this intervening three years—

MR. JACKSON: May I qualify that? I did not participate in the original hearing before the trial examiner; I did participate, stepped in at one point during the Appellant proceedings, and as a matter of fact I think I conducted the oral argument and handled the matter from that point forward.

Q. (By Mr. Barton) Mr. [Crofoot]*, during this period from August of '64 until December of '68, do you recall in [54] signing checks being made aware or discovering that there were some rather substantial legal expenditures being made by Golden State?

MR. JACKSON: Just a moment. Again I must object. This is not the witness' testimony. The witness testified that certain contributions were made to the Bottling Association in respect to attorneys' fees, but I don't think the witness has testified that the company paid substantial funds.

MR. BARTON: I merely asked him if he recalled.

TRIAL EXAMINER: I am a little confused by these references to the Bottling Association. The Respondent in the prior case was Golden State.

MR. JACKSON: That is my point.

TRIAL EXAMINER: That is who this gentleman is the President of?

MR. JACKSON: That is correct, your Honor.

TRIAL EXAMINER: What did the Bottling Association have to do with the unfair labor proceedings?

MR. JACKSON: This is the point, if I may explain, and I will be testifying to these effect myself.

TRIAL EXAMINER: No, this is a legal matter.

MR. JACKSON: But to explain, to just make it perfectly clear, the Sacramento Bottlers Association is an association of the soft drink bottlers in Sacramento, and my office is retained by the association, and it's by virtue of their [55] membership in the association that our services are made available to, or have been made available to the bottlers in connection with these unfair labor practice proceedings.

So the point being—

TRIAL EXAMINER: If an individual company is involved in an unfair labor practice proceeding, do they not pay the legal fees?

MR. JACKSON: No, they do not. Our bills are submitted to the Association.

TRIAL EXAMINER: And they are not resubmitted to the Respondents?

MR. JACKSON: No, they are not.

TRIAL EXAMINER: They only pay their shares by means of whatever they attribute to the Association?

MR. JACKSON: That is right. They are assessed, really, on a formula basis. It has nothing to do with the amount of the fees whatsoever.

TRIAL EXAMINER: I still think the question is proper, but I see now why you are asking it.

Do you remember the question?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Answer it.

THE WITNESS: I was aware of the fact I signed substantial checks to the Bottlers Association for legal fees.

MR. BARTON: Thank you. [56]

THE WITNESS: But may I add, none of the attorneys directly.

Q. (By Mr. Barton) And you were aware of the fact, were you, that these legal fees related to this unfair labor proceedings?

A. Not specifically.

Q. Did you ask anyone what they related to?

A. Not that I recall. I think those fees related to other problems too, other than just the labor relations practice.

Q. Uh-huh.

Now, Mr. [Crofoot]*, as Chief Executive Officer of Golden State, it would be a matter of some concern to you, would it not, if Golden State were involved in litigation involving several thousand dollars?

A. Not particularly.

Q. I see. Is that a fairly common undertaking for your bottling company?

A. To be engaged in litigation, you mean?

TRIAL EXAMINER: Involving several thousand dollars.

THE WITNESS: Yes.

Q. (By Mr. Barton) How about in litigation involving $20,000?

A. That would not be unusual.

Q. When you are involved in such litigation, Mr. [Crofoot]*, during the period you ran the bottling company, your corporation owned the bottling company, Mr. Schilling had [57] the authority to make decisions regarding such litigation or would you make them?

A. I would make them.

Q. You would make them. All right.

MR. BARTON: I am marking for identification as General Counsel's Exhibit 15, a document which pur-

ports to be an agreement between Golden State Bottling Company and Sam Snead All American Golf, Inc.

Q. (By Mr. Barton) Mr. [Crofoot]*, I show you General Counsel's Exhibit 15 for identification and ask if you have ever seen that document before.

A. Yes, sir. This is not a confirmed copy.

Without examining it all the way through, this is not a signed copy.

Q. I am aware of that. Would you look it over?

A. I can't see it, sir.

Q. Do you have your glasses with you?

A. No, sir, I do not.

We have another copy, I am sure, here. And I don't want to identify something that is multi-page, it isn't signed, without knowing it is the same.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

MR. BARTON: After conferring with Mr. Jackson, I [58] withdraw my Exhibit 15 and I am marking for identification GC 15, a document which also purports to be an agreement between Golden State Bottling Company and Sam Snead, All American Golf, Inc., and also bears the signature of E. J. Crofoot for Golden State, Harry Sarles, S-a-r-l-e-s, and I believe it's "Harvey" if I am not mistaken.

TRIAL EXAMINER: I can't read it myself.

MR. BARTON: Harvey. And Gene G. Schilling, S-c-h-i-l-l-i-n-g, and C. P. Williamson.

Q. (By Mr. Barton) Would you verify that this is the purchase agreement?

A. Yes, sir.

Q. Did you sign the legal copy of that document, Mr. Crofoot?

A. Yes, sir.

Q. And I presume that was concluded after a period of negotiations; is that correct?

A. Yes, sir.

Q. Did you participate in these negotiations?

A. I handled them all.

Q. Who else participated?

A. No one except Mr. Sarles and myself and Mr. Williamson, an attorney from the East.

Q. Were you represented by counsel?

A. Yes, sir. Mr. A. I. Diepenbrock. [59]

Q. How do you spell that?

A. D-i-e-p-e-n-b-r-o-c-k.

Q. What were the initials again?

A. A. I.

Q. When did these negotiations begin, to your recollection?

A. In approximately the latter part of December 1968.

Wait a minute. 1967.

Q. '67. And the agreement besides being signed on January 31, 1968, is that in factor correct?

How many drafts preceded this final document to your recollection?

A. I believe only one.

Q. Where did the negotiations take place, Mr. Crofoot?

A. In Dr. Diepenbrock's office in Sacramento.

Q. In Sacramento.

During the conversations in these negotiations, did you at any time consult with Mr. Schilling?

A. No, sir, I did not consult with him. He sat in, I believe . . . oh, during one negotiation that was held in the plant.

Q. And how soon prior to the conclusion of the agreement was that meeting where Mr. Schilling participated?

A. I can't answer. It was between the oral—when we started in December and the conclusion in January.

Q. Now, it's true that pursuant to this agreement, the [60] corporation which became known as All American was interested in purchasing the bottling plant as a going concern; is that correct?

A. Sir. I know nothing about All American.

Q. Well, that was a portion of your negotiations, was it not?

A. No, sir.

Q. You didn't discuss the operations of the plant at all?

A. Well, not with All American, no, sir.

Q. Well, with the people of Sam Snead?

A. I did with Sam Snead, All American Golf, yes, sir.

Q. Do you remember what you discussed regarding the operations of the plant?

A. Everything that we could think of.

Q. Everything? They wanted to know what kind of business they were getting, right?

A. Yes, sir.

Q. You talked to Mr. Schilling about what kind of business they were getting?

A. Did I?

Q. Did they, to your knowledge?

A. Not that I recall. Except if there was some matter that I was unable to give them information on the day-to-day operation, I would ask Mr. Schilling.

Q. Do you recall what matters you were unable to give them [61] information on about the day-to-day operations?

A. Not specifically, no, sir.

Q. They were probably concerned about labor relations problems you were having, were they not?

A. They were never mentioned.

Q. Never mentioned?

Did they indicate any interest in your satisfaction with the managerial personnel in the plant?

A. Yes, sir, they did.

Q. Did they go into that in great detail?

A. I wouldn't say in great detail. They asked for my opinion in connection with it, and I expressed it.

Q. Did they ask to meet with the individuals who were in charge of operating your plant to find out for themselves what kind of people were involved in this operation?

A. I believe they had an individual here from Ohio, if I recall, that was an operations man back there that did talk to Mr. Schilling and Mr. Sarles.

Q. And what was this man's name?

A. I can't answer that, sir.

Q. And you talked to Mr. Schilling yourself regarding the possibility of this transfer, is that correct, during the course of these negotiations?

A. Well, I told him I was doing it.

Q. Did you ask him if he would be willing to work for [62] Sam Snead?

A. Not that I recall, no, sir. [63]

* * *

(Witness—Crofoot)

Q. (By Mr. Barton) After this purchase, Mr. Crofoot, after your sale of the bottling company, were all

your ties with Mr. Schilling severed at this point in time?

A. No, sir.

Q. What ties remained, if any?

A. Well, personal ties, you mean?

We lived a few doors from each other.

Q. He was authorized to represent Golden State?

A. He was not authorized to represent Golden State.

Q. After the purchase, not at all?

A. No, sir, none whatsoever. [68]

Q. No authority to bind you in any way?

A. No, sir.

Q. Or make representations on his behalf?

A. No, sir.

Q. Or on behalf of Golden State.

All right. Now, Mr. Crofoot, before the successful negotiations with Sam Snead, you tried and on prior occasions to sell the bottling company, had you not?

A. Yes, sir.

Q. Dating back a number of years; right?

A. Yes, sir.

Q. And these had all been unsuccessful?

A. Yes, sir.

TRIAL EXAMINER: Obviously he hadn't sold it.

Q. (By Mr. Barton) In fact, once a negotiation concerned—was with Mr. Schilling himself, right?

A. No, sir.

Q. Never? You never negotiated with Mr. Schilling?

A. No, sir.

Q. Is it not true that during the course of the labor relations difficulties which gave rise to these proceedings in '63 that you were negotiating with Mr. Schilling for the sale of the plant to him?

A. I think Mr. Schilling at one time mentioned to me that he would like to try to put a group together to buy it, but we never got to the point of any negotiations. [69]

Q. Did you ever had any discussions at all with him about the possibility of selling to him?

A. Just that much, I believe, was all.

Q. The fact these discussions were disrupted by the labor relations difficulties which gave rise to these proceedings, right?

A. That is not true, sir.

Q. That is not true?

Now, have you discussed with anyone from All American Beverage Company the existence of these proceedings here? This backpay matter?

A. Yes, sir.

Q. When did you first discuss that?

A. Two or three weeks ago.

Q. Who did you discuss this with?

A. With Mr. Jackson and Mr. Schilling.

Q. And what was the subject of these discussions? What was said on that occasion?

A. I don't recall specifically, other than the fact I was informed there was to be additional hearings in connection with it.

Q. You contacted him first or did they contact you first?

A. I believe Mr. Jackson contacted me first.

Q. And it is true, is it not, that as a result of these discussions you agreed to indemnify All American for whatever [70] losses it incurred as a result of these proceedings?

MR. JACKSON: Objected to as irrelevant to these proceedings, your Honor.

MR. BURTON: I think it's quite relevant and from a former case the Board indicated it was quite interested in ramifications between the predecessor —

TRIAL EXAMINER: Are you talking about currently or at the time of the contract?

MR. JACKSON: Well, I believe the question refers to a current arrangement.

TRIAL EXAMINER: Well, I am asking counsel.

MR. BARTON: I think that question is at least open, your Honor, as to what the pertinence is.

TRIAL EXAMINER: Well, you prefaced it by asking him about Mr. Jackson and a representative of All American.

MR. BARTON: Yes, sir.

TRIAL EXAMINER: Does your question refer to some current understanding or prior understanding?

MR. BARTON: It refers to whatever understanding there was.

TRIAL EXAMINER: Current or past?

MR. JACKSON: If the Trial Examiner please, the agreement which has just been placed in evidence contains a warranty in its respect and it also contains an assumption of liability and specified liability. [71]

TRIAL EXAMINER: Well, I haven't had the advantage of seeing it.

MR. JACKSON: My point is, this is something that is already in evidence and is a matter of record.

TRIAL EXAMINER: And it's not in there, at least in your opinion?

MR. JACKSON: Precisely. Well, there is no assumption of this liability by the buyer.

There is an assumption of certain specified liability only, and there is a warranty that there is no litigation pending. So in other words, an assumption of this liability —

TRIAL EXAMINER: There is a warranty that there is no litigation pending?

Wasn't this pending?

MR. JACKSON: It was.

TRIAL EXAMINER: In other words, it's an incorrect warranty?

MR. JACKSON: The fact is at the time it completely slipped the minds of the parties.

TRIAL EXAMINER: Well, I am going to overrule the objection because I am interested. I don't know what the case is that counsel is referring to, but I can see the potential relevancy in any event.

MR. BARTON: Will you answer the question, Mr. Crofoot?

TRIAL EXAMINER: Do you remember the question? [72]

THE WITNESS: In this agreement, we did warrant any undisclosed liability.

TRIAL EXAMINER: That wasn't the question.

MR. BARTON: I will just restate it. Then it will save time.

Q. (By Mr. Burton) During the course of your recent discussions with representatives of All American, did you or did you not agree to indemnify All American for whatever losses it might sustain as a result of these proceedings?

A. I discussed it with Mr. Schilling and told him that I thought the contract covered our liability for any losses that might be sustained, but that if it didn't I would be happy to so guarantee.

TRIAL EXAMINER: This is recent?

THE WITNESS: Yes, sir; well, it's both—it's in the contract and it's —

TRIAL EXAMINER: Yes. But I mean this discussion was recent?

Q. (By Mr. Barton) And this is the first time you brought this matter up; is that right?

A. Yes, sir.

Q. And what was the scope of this indemnification, Mr. Crofoot? Did you agree to compensate the offices and agents of All American for whatever time they lost pursuant to this litigation? [73]

A. No, sir.

Q. Did you offer to assume whatever attorneys' fees they incurred?

A. Yes, sir.

Q. And you agreed to pay whatever was found running against them; is that right?

A. Yes, sir. [74]

* * *

CROSS-EXAMINATION

Q. (By Mr. Jackson) Mr. Crofoot, at the time of the sale, that is to say in January of 1968, was Golden State engaged in any other business?

A. Yes, sir.

Q. Aside from its Pepsi Cola Bottling operation?

A. Yes, sir.

Q. What other business or businesses?

A. They had the Crow's Nest Restaurant and Belford Arms Apartments, the South Gate Plaza Land Development, a thing called International Interpreter . . . did I mention Auto Bath, Auto Bath, Incorporated?

Q. I am sorry, I didn't get that last. Auto Bath? A-u-t-o

A. I believe so.

I believe that was all right at that time.

TRIAL EXAMINER: Is it still business?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And has assets and so forth?

THE WITNESS: Yes, sir. [76]

Q. (By Mr. Jackson) Is it still the owner and the operator of all these enterprises?

A. All but the Crow's Nest, and that was recently sold.

Q. Has it acquired any new operations or enterprises since that time?

A. No, sir. We have been looking for some, but we haven't acquired any.

Q. Who were the other shareholders in Golden State, or who were the other shareholders, let me say, at the time of the purchase?

A. At the time it was sold to Sam Snead All American?

Q. At the time the Pepsi Cola operation was sold to Sam Snead.

A. My son and myself.

Q. I believe you stated at that time—well, at that time was it then that you owned approximately 15 shares?

A. Yes.

Q. And he owned all the balance that was outstanding?

A. Yes, sir.

Q. And is that still the situation?

A. Yes, sir.

Q. Did Mr. Schilling—either Mr. Gene Schilling or Mr. William Schilling ever own any shares in Golden State?

A. No, sir.

Q. Is your son an officer of the corporation? [77]

A. Yes, sir.

Q. What is his title?

A. Vice President and Assistant Sceretary, and the Treasurer.

Q. Was that also his title at the time of the sale Sam Snead All American?

A. Yes, sir.

Q. Now, how did the negotiations with Sam Snead come about? Can you explain the circumstances in your own words?

A. Yes, sir. I had been discussing the sale of the Pepsi Cola operation to United Artist Theatres, Incorporated, and apparently Pepsi Cola Corporation objected to transferring the title to them and said they would produce a buyer and they produced Sam Snead All American Golf and introduced me to Mr. Sarles.

Q. Prior to the time they produced Sam Snead had you known of the company or known any of its principals?

A. No, sir.

Q. Had you ever owned any stock in it?

A. No, sir.

Q. Had any member of your family or any shareholder, officer or director to your knowledge held any interest whatsoever in Sam Snead?

A. No, sir.

Q. Prior to this time when you were introduced to them and prior to the sale, so far as you were aware, did any officer [78] or director or shareholder of Sam Snead or any enterprise connected with it own any interest in or have any position with Golden State?

A. No, sir.

Q. Is it a fair statement to say that prior to the time the parent company produced them as a prospective buyer, they were complete strangers to you?

A. Absolutely.

Q. Do you presently own any stock in All American?

A. No, sir.

Q. Does any member of your family have any stock in All American?

A. No, sir.

Q. When you refer to All American, I am referring to Sam Snead.

A. I understand. Yes, sir.

Q. Are you an officer or director of All American?

A. No, sir.

Q. Or is any member of your family an officer or director of All American?

A. No, sir.

Q. I believe you stated, Mr. Crofoot, that you personally conducted all of the negotiations conducted with the sale of Pepsi Cola to All American.

A. As far as representing the company is concerned, and, of [79] course, with the guidance of Mr. Diepenbrock.

Q. Yes.

But were you present at all of the negotiations sessions?

A. Yes, sir.

Q. Was the question of this litigation or the proceedings that led up to it mentioned at any time during the course of those negotiations?

A. No, sir.

Q. Was the question of pending litigation against Pepsi Cola or pending litigation in which Pepsi Cola might be involved ever raised or discussed in the course of any of these negotiations?

A. Yes, sir.

Q. And what was said in that connection?

A. I said that there was no pending litigation.

TRIAL EXAMINER: By Pepsi Cola you are referring to Golden State?

MR. JACKSON: Yes, I am referring—
I don't know that.

THE WITNESS: The same would be true.

MR. JACKSON: Your Honor, whether the Crow's Nest or the apartment building or some of those may be involved in litigation, I am speaking solely of litigation involving the bottling corporation.

TRIAL EXAMINER: You just said Pepsi Cola, and I wasn't [80] exactly sure the record was clear.

MR. JACKSON: Surely. I understand. I mean that Golden State-Pepsi Cola operation.

THE WITNESS: That is correct, sir.

Q. (By Mr. Jackson) On your direct examination, Mr. Crofoot, you were asked as I recall whether you severed all ties with Mr. Schilling following the sale to Sam Snead. I am referring to Mr. Gene Schilling.

And as I recall you said, "no." I would like to ask if you meant in that context, or I would like to rephrase that question and ask you if you severed all business ties with him.

A. No, sir.

Q. Did you still have some business connection or ties with Mr. Schilling?

A. In that he consults me occasionally, yes, sir.

Q. But do you have any formal business relationship with him?

A. No, sir.

Q. He has no further relationship with Golden State Bottling?

A. No, sir, none whatsoever.

Q. Was his relationship with Golden State terminated at the time of sale?

A. Yes, sir.

MR. JACKSON: I think that's all. Thank you, Mr. Crofoot. [81]

MR. BARTON: Just a couple of points, Mr. Crofoot.

REDIRECT EXAMINATION

Q. (By Mr. Barton) You indicated to Mr. Jackson that the subject pending litigation was in fact discussed during litigation?

A. I didn't quite hear you, sir.

Q. Well, just a couple of moments ago you said the subject of pending litigation involving the bottling company was discussed during litigation.

A. Yes sir. I was asked if there was any pending litigation, and I said, "no," that there was none.

Q. And I gather from that testimony that representatives of Sam Snead asked you if there was pending litigation and you told them no, right?

A. That is correct, sir.

Q. Now, before you gave them an answer, did you stop to consult with anyone?

A. No, sir.

Q. At the bottling plant?

A. No, sir.

Q. Is that right?

A. I beg your pardon.

Q. You just gave them a snap answer right at that time?

A. Yes, sir, I did.

Q. And I take it from that, then, that you actually were [82] confident in your own mind there was no pending litigation?

A. I hadn't remembered any, no, sir. And my attorney knew of none.

Q. Did your attorney represent you? Represent the bottling company in all litigations?

A. For approximately 25 years, yes, sir.

Q. He didn't represent the bottling company in labor relations matters, did he?

A. No, sir.

Q. It was also mentioned that after the sale of the bottling company you continued to have business ties with Mr. Gene Schilling.

A. I don't think that I said that. I said that he consulted me occasionally, and if you want to interpret that as business ties, . . .

Q. Well, I misunderstood your interpretation as to what you meant by that.

What consultation did you have with Mr. Schilling?

A. Well, I think occasionally he asked me about the price of different types of containers.

Q. Questions concerning the operation of the bottling plant; is that right?

A. Yes, sir.

Q. And I take it during the course of these discussions there was no mention made to you regarding this backpay matter concerning Ken Baker? [83]

TRIAL EXAMINER: He can't hear you, sir.

Q. (By Mr. Barton) Ken Baker, the man sitting right here?

A. No, sir.

MR. BARTON: I have no further questions.

RECROSS-EXAMINATION

Q. (By Mr. Jackson) Mr. Crofoot, have either myself or my firm ever represented Golden State in any proceedings other than this one here?

A. No, sir.

Q. Who is your regular attorney?

A. I. E. Diepenbrock.

Q. Has Golden State Bottling Company ever been billed for legal services by myself or my firm?

A. No, sir.

MR. JACKSON: No further questions.

TRIAL EXAMINER: Is Golden State Bottling Company, is that still the name of your company?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Does it have any bottling business now?

THE WITNESS: No, sir.

TRIAL EXAMINER: It has none? No business like the Pepsi-Cola Bottling Company business that it had?

THE WITNESS: No, nothing even approaching it. No, sir.

TRIAL EXAMINER: That is all.

MR. JACKSON: May I should clear that up for the record. [84]

Q. (By Mr. Jackson) As of the time of the purchase and sale, did Golden State Bottling Company cease all business in the bottling business?

A. In every way.

Q. And has it had any activity in that area in any way since that time?

A. No, sir.

* * *

EUGENE SCHILLING

was called as a witness by and on behalf of the General Counsel and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Barton) Will you spell your name for the record, Mr. Schilling? [85]

A. Eugene Gardner Schilling, S-c-h-i-l-l-i-n-g.

Q. What is your current address?
A. 6383 West Parkway, Sacramento.
Q. Where are you presently employed?
A. Pepsi Cola Bottling Company of Sacramento, 11 "Q" Street.
Q. Your position is President and General Manager of the Division operating that division; is that correct? And in that position are you the chief executive of—at that location?
A. On a day-to-day operation, yes, sir.
MR. BARTON: I will interrogate Mr. Schilling under Rule 43(b).
TRIAL EXAMINER: All right.
Q. (By Mr. Barton) Who, if anyone, in the All American hierarchy do you consult regarding business conditions at the bottling plant?
A. Mr. Robert E. Haley. H-a-l-e-y.
Q. What is his position, do you know?
A. He is President and Chief Executive Officer of All American Beverages.
Q. And where is he located?
A. Springville, Ohio, at the Pepsi Cola Bottling Company.
Q. How often do you get in touch with Mr. Haley?
A. As often as necessary. [86]
Q. About how often does that average?
A. Possibly once a month to one every six weeks.
Q. And what is your principal means of communication?
A. By telephone or correspondence.
Q. Does he ever come out to the plant?
A. Oh, occasionally.
Q. How many times has he come out to the plant since the purchase?
A. I would say four or five times.

Q. Have you ever gone back to Ohio to consult with him?

A. I went back once, yes, sir.

Q. Is there anyone else in the All American hierarchy that you consult with?

A. No, sir.

Q. What is the range of your responsibility? You are in charge of the day-to-day operation? What kind of decisions are you required to consult with Mr. Haley about?

A. We are contemplating the construction of a new bottling plant. I have discussed with him the purchase of the property for the plant, the plans for the plant, the equipment to be purchased.

Q. Would it be correct to state, then, that any expenditure that is out of the ordinary course of business is the kind of thing you consult with him about?

A. Yes, sir. [87]

Q. Do you send any monthly reports of expenditures?

A. Yes, sir. We send a monthly profit and loss statement.

Q. Does this profit and loss statement detail the expenditures and* receipts received by the bottling plant?

A. Yes, sir.

Q. How about legal proceedings? Do you consult with him regarding those?

A. No, sir.

Q. Do you have authority to handle those on your own; is that correct?

A. We haven't had any as of yet.

Q. I see. Have you been given any guidelines as to what circumstances you should seek authorization to [proceed]* or settle, or whatever, when such a proceeding arises?

A. Well, if the occasion arose, I would contact Mr. Haley.

Q. Now, I gather as [President]* and General Manager of this operating division, Mr. Schilling, part of your obligation is to become familiar with the instruments to transfer, which occasions the transfer of assets; is that correct?

A. No, sir, that is not correct.

Q. You haven't been concerned with what liabilities All American assumed and what it did not assume?

A. I was not in on the negotiations of the contract in detail.

Q. Well, as General Manager is it your responsibility to authorize payments of expenditures as they come into the [88] bottling plant?

A. Yes, sir.

Q. Did you write the checks, sign the checks?

A. With other signatures, yes, sir.

Q. What other signatures?

A. Our controller, Mr. Love, William Schilling, George Steers.

Q. And these people are all located at the bottling plant; is that right?

A. Yes.

Q. And in signing these checks and in reviewing these expenditures, it is part of your obligation, is it not, to verify that the obligation that the bill being paid is one which you owe; is that right?

A. Yes, sir.

Q. Which the bottling company owes or All American owes?

A. Yes, sir.

Q. And if you saw a bill and it wasn't All American's responsibility or the bottling plant's responsibility,

you wouldn't pay the check, right? You wouldn't pay the bill?

A. Not if it wasn't a responsibility of All American Beverages.

Q. You were aware under the transfer of assets that All American had assumed some liability and not others; right?

A. We assumed that contracts were due on vending equipment. [89]

Q. You were aware that there were certain liabilities that All American had not assumed, were you not?

A. I don't know what you have reference to.

Q. Well, let's take an example. I note that the purchase agreement indicates that one item which is not being transferred to All American is the [boat]* entitled "Miss Pepsi." Were you aware of the existence of such a [boat]*?

A. I knew there was such a [boat]*, yes, sir.

Q. Prior to the transfer of assets, when you were a general manager for Golden State, did expenses come in regarding the maintenance of Miss Pepsi?

A. Not to my knowledge.

Q. If maintenance repairs came in now, you wouldn't pay them, would you?

A. No, sir.

Q. Are there any other obligations, say, an obligation of Golden State regarding the obligation of Belford Plaza? If that were sent to Golden State or the bottling plant under the assumption that was still run by Golden State, you wouldn't pay that?

A. If it was an obligation of Golden State?

Q. Yes.

A. No, sir.

Q. Likewise with all of the other operations of Golden State mentioned by Mr. Crofoot earlier? South Gate Development, [90] International and Auto Bath? If any bill comes in relating to the operations of those enterprises, you wouldn't pay, would you?

A. No, sir.

Q. You would feel that that would be actually a negligent undertaking of your duties, would you not?

A. Yes, sir.

Q. I gather from your testimony then, Mr. Schilling, that within the scope of your responsibilities after the purchase by All American your responsibilities have increased somewhat over what they were before; is that correct?

A. Yes, sir.

Q. I asked you before if you had no responsibility in handling legal proceedings, and now you do; is that right?

A. Correct.

Q. How often did you check with Mr. Crofoot when you were with Golden State over the operation?

A. Four to five times a week.

Q. It is true, is it not, that you called Mr. Crofoot in and found yourself in labor difficulties in 1963, is it not?

A. I don't recall talking to Mr. Crofoot about it.

Q. Do you recall the day in which the men walked out and wouldn't work?

A. Yes, sir.

Q. Do you know whether or not Mr. Crofoot was present on that [91] occasion?

A. No, sir, he was not present.

Q. When the unfair labor charges were charged against Golden State as a result of his labor relations problems, did you discuss this with Mr. Crofoot?

A. I may have, I can't recall it.

Q. A formal complaint was issued by the Regional Office of the National Labor Relations Board; it was served on the bottling company at that location. Did you advise Mr. Crofoot of that fact?

A. No, sir.

Q. It became necessary to go to formal hearing in August of 1963. Did you advise Mr. Crofoot of that?

A. Not to my knowledge.

Q. And ultimately when the Trial Examiner issued his decision —

TRIAL EXAMINER: Before you get that far, were you present at the hearing before the Trial Examiner?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: All right. Go ahead.

Q. (By Mr. Barton) After the Trial Examiner issued his decision adverse to Golden State, did you advise Mr. Crofoot of that?

A. No, sir.

Q. Did you advise him of any other of the other procedures [92] which ensued subsequent to the issuance of that Trial Examiner's decision relating to that case?

A. I am sorry. Would you be more specific?

Q. Well, ultimately I guess someone at Golden State decided to test the Board's order in the Ninth Circuit Court of Appeals.

Your were aware of that decision, were you not?

A. Yes, sir.

Q. Did you make that decision?

A. Yes, sir.

Q. Making that decision, did you consult with Mr. Crofoot?

A. I don't believe so.

Q. There were a series of rehearings and motions for consideration, were you consulted whether or not the company wanted to pursue those beyond that point?

A. No, sir.

Q. You were not consulted?

Who made the decision to begin with those proceedings?

A. I believe I did, sir.

Q. You say you weren't consulted. You mean you made decision on your own; is that right?

A. Yes, sir.

Q. And you advised your attorney of it, right?

A. Pardon me?

Q. You advised your attorney of that decision, right?

[93]

A. Mr. Jackson.

Q. Is that right?

A. Yes, sir.

Q. Incidentally, you were present when Mr. Crofoot testified, is that correct?

A. Yes, sir.

Q. And you heard him testify you had no authority to represent Golden State subsequent to the transfer of the bottling company to All American, did you not?

A. Would you say that again, please?

Q Did you hear him testify that you had no authority after the transfer of assets to represent Golden State?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

You refer to after the plant was sold?

TRIAL EXAMINER: Yes.

MR. BARTON: That is right.

Now, at the time of the transfer, Mr. Schilling, how many employees were employed at the bottling plant?

THE WITNESS: I would have to look at the payroll records.

Q. (By Mr. Barton) What is your best estimate?

A. 50.

Q. Would you tell me who these people include? What the various job classifications were? [94]

A. I can give you department heads.

Q. Well —

TRIAL EXAMINER: He doesn't want names; he just wants job classifications.

The kind of jobs.

Q. (By Mr. Barton) For instance, I gather one job classification was driver-salesmen.

A. Right.

Q. How many driver-salesmen were there at that time, to the best of your recollection?

A. 8 or 10.

Q. What other classifications were there?

A. Independent distributors.

Q. And how many of those were there?

A. 10 or 12.

Q. And you are including those in your No. 50; is that right?

A. Yes, sir—no.

Q. No, sir? 10 or 12 in addition to whatever classifications were included in this 50?

A. We had office staff.

Q. How many of those?

A. 6 of those.

Q. Those were office-clerical; is that right?

A. Right. [95]

Q. Typists and such.

What other classifications?

A. The production crew.

Q. How many of those?
A. I believe 14.
Q. So we have got 14, and 6 is 20, times the salesmen. That leaves about 20 people. How many are those?
A. I believe that adds up to 32. We have a vending operation.
Q. How many people involved in that?
A. I believe four.
Q. What other prospects?
A. Fountain operations.
Q. How many in that?
A. At the time of the transfer?
Q. That is correct.
A. 2.
Q. What other classifications?
A. The warehousemen.
Q. How many warehousemen?
A. One—two. One warehouseman who is a checker; one who operates a forklift.
Q. What other classifications?
A. We have four or five of what we call speciality men or special vender merchandisers.
Q. Anybody else? [96]
A. I believe that about covers it.

MR. BARTON: What is my next exhibit?

THE REPORTER: No. 16.

MR. BARTON: I am marking for identification, General Counsel's Exhibit No. 16(a), which purports to be a copy of a letter addressed to Gene G. Schilling from myself dated November 18, 1969. It's a 2-page document.

(The document above-referred to was marked General Counsel's Exhibit No. 16(a) for identification.)

THE WITNESS: If I may sir, may I add the category of approximately four routes such as supervisors that are in our sales department?

Q. (By Mr. Barton) I am glad you reminded me; I meant to ask you about the supervisory personnel.

Will you tell us what the supervisory structure was at the time of the transfer?

A. They are termed district managers.

Q. Pardon me?

A. Their term is district manager.

Q. Are these the route supervisors; is that right?

A. Yes, sir.

Q. How many of those were there?

A. I believe four.

Q. These people have the power to hire and fire? [97]

A. No, sir.

Q. Can they recommend hiring and firing?

A. No, sir.

MR. BARTON: May we go off the record for a minute?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

Q. (By Mr. Barton) Aside from these gentlemen, who were the supervisory people?

A. Our production manager.

Q. One production manager?

A. Yes, sir.

Q. And anybody else?

What is his name, by the way?

A. George Steers.

Q. And there was yourself?

A. And William Schilling.

Q. What was his position?

A. He is sales manager.

Q. Is that the extent of the managerial hierarchy at the time of the transfer?

A. Our control, Neil Love, L-o-v-e

Q. Does that pretty much do it?

A. That does it.

MR. BARTON: I believe I indicated, your Honor, I was [98] marking 16 GC-A for identification.

TRIAL EXAMINER: Yes.

MR. BARTON: I also want to mark as General Counsel's Exhibit 16(b) an exhibit which purports to be a letter addressed to me, signed by Gene G. Schilling, dated November 28, 1969.

TRIAL EXAMINER: Allright.

(The document above-referred to was marked General Counsel's Exhibit No. 16(b) for identification.)

Q. (By Mr. Barton) Mr. Schilling, I show you General Counsel's 16(a) for identification and ask you if you are familiar with that document.

A. Yes, sir, I am familiar with this.

Q. Did you receive the original letter in the mail on or about that date? Several days thereafter?

A. I received the letter, yes, sir.

Q. I will show you General Counsel's Exhibit 16(b) for identification and ask if you are familiar with that document.

A. Yes, sir.

Q. Is that your signature on 16(b)?

A. Yes, sir.

Q. Did you cause this letter to be prepared?

A. Yes, sir.

MR. BARTON: I would offer General Counsel's 16(a) and 16(b) into evidence at this time. [99]

TRIAL EXAMINER: Any objections?

MR. JACKSON: No objections.

TRIAL EXAMINER: They may be received.

(The documents above-referred to heretofore marked General Counsel's Exhibit No. 16(a) and 16(b) for identification, were received in evidence.)

Q. (By Mr. Barton) Directing your attention to Item 3 in GC 16(b), Mr. Schilling, I note that you refer to the fact that at the time of the transfer all but three of the employees were retained.

A. Yes, sir.

Q. In making that statement, did you have reference to all the employees exclusive of the distributors?

A. No, sir.

Q. You included the distributors as well?

A. No, sir.

Q. I guess my question wasn't clear.

A. Possibly I didn't understand.

A. Let me put it to you again: Making that statement, you were not including the distributors?

A. I was not including the distributors.

Q. So in essence in that document you are saying that of these other classifications, two employees were not retained, two of the 50, or some that you enumerated before; is that correct? [100]

A. That is correct.

Q. And one was [replaced]?*

A. That is correct.

Q. And one was replaced about a year thereafter?

A. That is correct.

Q. Now, as to the distributors who had contracts with Golden State, I gather Golden State—that All American assumed all of those contracts; is that correct?

A. Yes, sir.

Q. So that all the distributors that were working for or with Golden State continued with All American; is that correct?

A. That is correct.

Q. Now, the time that Ken Baker was fired by Golden State, he was working as a driver-salesman, right?

A. Yes, sir.

Q. It is true, is it not, that as little as a week prior to his termination you informed Mr. Baker that you considered him to be a good man doing good work, right?

A. That is correct.

Q. It is also true, is it not, that in your opinion as the general manager of the bottling plant operation the most important phase of the job of driver-salesmen was developing routes, obtaining new accounts, obtaining additional displays and obtaining additional space in the cooler. Is that not [101] true?

A. That is part of their function.

Q. It was your feeling that was the most important function; isn't that true?

A. Those are important functions.

Q. You wouldn't say most important?

A. They are important functions, I will go along with that.

Q. Are there any functions of a driver-salesman that you would consider to be more important than developing routes, obtaining new accounts, obtaining additional displays, obtaining additional space in the cooler? Which I assume, I would gather means coolers in the space of customers that stock Pepsi Cola.

Would you say in your opinion those are the most important functions of a driver-salesman?

A. Those are important.

I would like to add to that, placing the point of purchasing advertising.

Q. Would that be included in obtaining additional displays?

A. No.

Q. What do you mean by points of purchasing advertising?

A. Points of purchasing advertising . . . advertise the product for sale and also building the good will of the company.

Q. In essence— [102]

TRIAL EXAMINER: Well, just so I will understand this some time in the future, what do you mean by points of purchase advertising as distinguished from displays?

THE WITNESS: A display, sir, is a carton or a display carton of Pepsi Cola for sale. The purchasing of advertising is a sign placed in or outside the store.

TRIAL EXAMINER: All right. Go ahead.

Q. (By Mr. Barton) And it is true, is it not, that you consider the actual driving and delivering of merchandise and picking up empty bottles to be fairly minor and routine aspects of a driver-salesmen's duties?

A. The driving part is minor.

Q. And also delivery is somewhat mechanical, is it not?

A. No, sir.

Q. You wouldn't consider that to be a minor aspect of the job?

A. No, sir. It's a major aspect of the job.

Q. You think that's a major aspect?

I believe you said, Mr. Schilling, earlier that you testified in the unfair labor practice proceedings in August of 1963; is that correct?

A. Yes, sir.

MR. BARTON: I will mark for identification General Counsel's Exhibit 17, volume 2 of the official report of proceedings before the National Labor Relations Board. [103] I will offer it for inspection to counsel.

TRIAL EXAMINER: What's the date of it?

MR. BARTON: August 22, 1963.

That was the second day of the proceedings.

(The document above-referred to was marked General Counsel's Exhibit No. 17 for identification)

Q. (By Mr. Barton) Mr. Schilling, I show you General Counsel's Exhibit 17 for identification and direct your attention to page 142 of that document.

Do you notice where it bears your name and indicates direct examination?

A. You mean here?

Q. Yes.

A. Yes.

Q. Now, will you read through that document for the next—to the top of Page 145? Read over that and see if you recall giving that testimony.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

THE WITNESS: Yes.

Q. (By Mr. Barton) Have you completed that?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

Q. (By Mr. Barton) Do you recall giving that testimony, [104] Mr. Schilling?

A. Yes, sir.

Q. You gave it under oath, did you not?

A. Yes, sir.

MR. JACKSON: Before we go any further, I would like to ask if you are questioning on direct examination. You are relating to the point of time of 1963?

Is that what we are talking about?

MR. BARTON: That is right.

MR. JACKSON: All right.

Q. (By Mr. Barton) Now, let me read aloud with you, Mr. Schilling on Page 44 of that document in answer to a question from your attorney, Mr. Franz, and at that time he put a question to you: "Now, with respect to the relative importance of delivering the bottles and picking those up in comparison to some of those other duties you described, how would you compare the importance?"

Your answer was: "The delivering of the Pepsi Cola and picking up of the empties is actually the most minor of importance of the entire job. That is why we call them salesmen instead of driver-deliverymen.

"The most important phase of the job is developing their routes, obtaining new accounts, obtaining additional displays, obtaining additional [space]* in the cooler."

Is that your testimony there? [105]

A. Yes, sir.

Q. Was that your testimony at that time?

A. Yes, sir.

Q. Was that true testimony at that time?

A. (No response.)

Q. So with regard to any testimony you are giving this afternoon, the conflict in testimony this afternoon is in error, isn't it?

A. No, sir. What I say—

MR. JACKSON: Just a moment.

I think he is entitled to explain that answer.

TRIAL EXAMINER: His answer was "no."

MR. JACKSON: All right.

TRIAL EXAMINER: You can explore it on cross.

MR. JACKSON: My feeling was that the witness wishes to give an explanation as to his answer. I think he should be entitled to do so.

I will cover it on cross.

TRIAL EXAMINER: Well, I am sure it will come up again, so go ahead and explain it if you want to. If you can.

THE WITNESS: I can do it very quickly.

If the delivery—if the delivering of the full merchandise and picking up of the empties is done thoroughly, then, it ceases to be a problem. If the delivering of the full merchandise and picking up of the bottles is not done [106] thoroughly, it becomes a major problem.

MR. BARTON: I see.

Q. (By Mr. Barton) So when you told Mr. Baker that you considered him to be a good man doing a good job, you must have meant that he did a good job developing the route, obtaining new accounts, obtaining additional displays and obtaining additional displays in the cooler.

A. I said that with this thought in mind: We learned a long time ago that we get finer results from a person if we pat them on the back and tell them they are doing a good job. We would rather do this rather than tell the person point blank, "you are doing a lousy job, and shape up."

Q. What in your opinion makes a good distributor, Mr. Schilling?

A. To be a good distributor it is necessary to be a self-starter, he has personal pride in himself, personal pride in the product that he is selling, does the things that are necessary to increase his income, is a good salesman, builds good will with his customers, does everything possible to see to it that they are properly serviced and that their displays are up, gives them all the services that are necessary to keep the account in first-class shape.

Q. And in essence what you are saying is the attributes of a good distributor are pretty much the attributes of a good driver-salesmen? [107]

A. They have to do this of their own volition. It isn't a thing we supervise; it is the thing they have to have the initiative to do it upon their own.

TRIAL EXAMINER: At the current time you have both categories?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And you did then? At least after you started having distributors, Golden State had both categories?

THE WITNESS: Yes, sir.

Q. (By Mr. Barton) Turning your attention back a moment, Mr. Schilling, do you recall my question to you regarding whether or not Mr. Crofoot was present on the occasion which the driver-salesmen walked out back in April of '63? Do you recall me asking you that question?

A. If Mr. Crofoot was present?

Q. Yes.

A. I don't recall you asking me that question. Possibly you did.

Q. Well, let me ask you: Do you recall Mr. Crofoot was present on that occasion?

A. He was not present.

You are referring to Mr. E. J. Crofoot?

Q. Yes. The gentleman who testified earlier.

A. Yes, he was not present. [108]

* * *

EUGENE SCHILLING

was recalled as a witness by and on behalf of the General Counsel and having been previously duly sworn, was examined and testified further as follows:

TRIAL EXAMINER: You are still under oath, Mr. Schilling.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

Q. (By Mr. Barton) Mr. Schilling, if I may direct your [113] attention back just briefly to our discussion yesterday regarding the occasion about April of 1963 when the men left the plant on the occasion giving rise to some of the unfair labor practices involved in the original proceedings in this case, we had some exchange as to whether Mr. E. J. Crofoot, Sr. was present on that occasion, and I understood you to say that he was not present at the time the men left the plant; is that correct?

A. That is correct, sir.

Q. Was he at any time present during succeeding events which transpired that day involving the men?

A. No, sir.

Q. He wasn't present at any time that day?

A. No, sir. Not to my knowledge.

Q. All right. Now, I might shift your attention again, Mr. Schilling, to the mode of compensation for the driver-salesmen during the period '62 through '64 in regards to the commissions these men were paid. Is

that commission computed the same way today as it was then?

A. My answer to that would be no, sir.

Q. Then would you tell me how the commission was computed during the period '62 to '64?

A. During that period the commissions were paid on a quarterly basis. If the total plant sales for the quarter, let's say the first quarter of 1963, were in excess of total plant sales [114] for the same quarter of 1962, there was a commission paid to each route salesman for every case that came off his truck. That commission was arrived at by a percentage of increase, total increase, of the plant sales for the quarter of '63 as compared to the similar quarter of '62. The greater the percentage of increase, the greater the commission was per case paid to the route salesman. If there was no increase for the quarter, there was no commission paid.

Q. Now, in the case of each individual driver-salesman, was his commission based upon the amount of increase and the number of cases sold or the total cases sold?

A. It was based on total cases sold.

Q. Mr. Baker started working for you in June of '62; is that right?

A. I believe that is correct.

Q. Now, when, to your recollection, did you first begin switching to this distributorship system, Mr. Schilling?

A. October 1st, 1964.

Q. And would you describe what that arrangement was, please?

A. It was on an experimental basis with us. We were attempting to derive some means whereby an employee

would be in business for himself and cease to be an employee of the Company, but have his own business. We attempted to set up roots whereby an independent distributor would make at least as much, if not more, money for himself than he would [115] working as a route salesman.

Q. And as I understood your testimony yesterday, or perhaps it was the statement of your counsel for the record, Pepsi-Cola sold beverages to the distributors at a discount, right?

A. At a distributor's price, correct.

Q. And that discount was in most instances 30 cents a case, right?

A. In most instances.

Q. A couple of exceptions where people had routes which required more extensive driving; is that right?

A. That is correct.

Q. Which routes were these? The ones which did not —which had a larger margin?

A. The one that I recall offhand was a route that seemed—it went from Roseville up through Auburn and up to Colfax and back. It covered a considerable amount of mileage.

Q. Was that the only one, or were there others?

A. That's the one that I recall right now.

Q. Your regular driver-salesmen drove trucks that were rented from Hertz by your Company; is that not correct?

A. That is correct.

Q. And to your knowledge, did all or most of the distributors continue to rent their trucks from Hertz?

A. They do to my knowledge rent their trucks from Hertz, yes, sir. [116]

Q. Now, who is the first driver-salesman who became a distributor, Mr. Schilling?

A. Don Thorne.

Q. And about when did he start as a distributor?

A. October 1st, 1964.

Q. Did he keep pretty much the same route he had as a driver-salesman?

A. No, sir. I believe that we added some additional stops to his territory.

Q. I see. So he took what he had plus a little more; is that right?

A. That is correct.

Q. About how many more stops were added to your recollection?

A. I don't recollect.

Q. About that same time Mr. Williford started as a distributor; is that correct?

A. I believe that's correct.

Q. Did he keep pretty much his same route?

A. I believe so. I'm not positive on that.

Q. It might have been a couple of extra stops added?

A. I can't answer that.

Q. Mr. Williams, he started about that same time, too, right?

A. I don't recall when George Williams started.

Q. He did become a distributor, though; is that right?

A. Yes, sir. [117]

Q. Within a few months thereafter, right?

A. I don't recall Mr. Williams' date when he became an independent distributor.

Q. I am showing you General Counsel's Exhibit 6, Mr. Schilling. Was this document prepared under your supervision?

A. Yes, sir.

Q. You examined it to see that it's correct?
A. Yes, sir.
Q. Now, Mr. Williams started—he shows a starting date of 10-64.
A. That is correct.
Q. Does that refresh your recollection?
A. That is when he started as a distributor.
Q. Did he keep pretty much his same route?
A. Mr. Williams, prior to coming to work for us, was working for Hires Root Beer Company.
Q. He started right in as a distributor?
A. Right.
Q. I see. Do you know who had Mr. Williams' route before he started?
A. I do not know without looking at the records. I believe it was Irv Evans, but I'm not positive.
Q. Irv Evans?
A. The territory that he took on was the South Sacramento area. [118]
Q. Irv Evans was not working for you at the time; is that right?
A. I wouldn't know without looking at the records.
Q. Now, Mr. Salo started about that same time as a distributor; is that not correct?
A. If that is what the appendix shows, or the exhibit shows.
Q. I'll keep this in front of you; if you need to refresh your recollectioon, you can take a look at it.
Is that correct?
A. Mr. Salo started November 9, 1964.
Q. And he took over a combination of his route and Mr. Helmer's route; is that correct?
A. I believe that is correct.

Q. And before he started in, you had offered Mr. Helmer the opportunity to become a distributor, had you not?

A. I don't recall.

MR. JACKSON: Who is Mr. Helmer?

THE WITNESS: I don't recall that, sir.

Q. (By Mr. Barton) Mr. Ames started as a distributor on October of '68, did he not?

A. That is correct, sir.

Q. And he kept pretty much his same route, did he not?

A. I believe we added onto Mr. Ames' territory.

Q. You added a little bit? How many stops, approximately?

A. I don't recall. [119]

Q. Was it very much?

A. When you say very much, we added on enough territory to a man's route so he would be in a position to make more money as a distributor than he was making as a route salesman.

Q. I see.

TRIAL EXAMINER: Where did you get this additional territory from?

THE WITNESS: Reducing Company routes.

Q. (By Mr. Barton) Oh, incidentally, I think I misled you.

TRIAL EXAMINER: Wait a minute. I don't understand that answer.

THE WITNESS: We have route salesmen who are paid on a weekly basis. In the event that one route abuts another route, there may be, say, one good stop that with service by an independent distributor would increase his earnings, whereby we would take the loss or whatever it would be, on the Company route.

In other words, we were more interested in the distributors' routes being productive at the time than we were of the Company's route salesmen.

TRIAL EXAMINER: In other words, the overall customers of the Company did not increase, per se, as of that moment?

THE WITNESS: No, sir.

TRIAL EXAMINER: So to increase it, increase a new distributor's route, you would have to take some stops away from [120] a salesman?

THE WITNESS: That is correct.

TRIAL EXAMINER: All right, go ahead.

Q. (By Mr. Barton) I asked you previously about Mr. Salo. Mr. Salo was a combination of his and [Mraule's route]*, was he not? Do you recall that?

A. I don't recall that, no, sir.

MR. JACKSON: A combination of Mr. Salo's and Mr. —

MR. BARTON: [Mraule. M-r-a-u-l-e.]*

Q. (By Mr. Barton) Mr. [Mraule]* had been offered a route, had he not?

A. No, sir.

Q. He did not?

Sherman Karr became a distributor about December of '64; is that not correct?

A. December of '64 is correct, sir.

Q. And he kept pretty much his same route, did he not?

A. To my knowledge, yes, sir.

Q. A couple of stops might have been added to puff up his sales?

A. There were adjustments that take place constantly on the routes.

Q. But it was pretty much the same ones?

A. Same area.

Q. And Myrel McHann became a distributor on or about the [121] first of the year of 1965; is that correct?

A. That is correct.

Q. Mr. McHann had been on a low volume, but which you had not decided to make a distributorship. He switched, is that not true, when he became a distributor?

TRIAL EXAMINER: Switched routes, you mean?

THE WITNESS: I don't remember that, no, sir.

Q. (By Mr. Barton) Do you recall that when he became a distributor, he took over the route which had been run by Mr. Helmer?

A. That is correct.

Q. And Mr. Helmer had been offered it before, but Mr. McHann took it over; is that right?

A. We did not offer Mr. Helmer a distributorship.

Q. I see.

Now, do you recall me—before we switch to that—Are these individuals I am enumerating here, do they include all the distributorships that were created at the outset?

A. I believe that is correct.

Q. And so that includes, if my count is correct, seven distributorships; is that correct?

A. We have one here, Ed Varesconi, January 1st of 1965.

Q. He had been a supervisor before; is that correct?

A. That is right.

Q. Whose route did he take over? [122]

I assume he didn't have a route when he was a supervisor; is that right?

A. I don't know whose route he took over. I could tell you the territory it consisted of.

Q. Now, do you recall a particular meeting at which you first discussed this proposed distributorship plan to the driver-salesmen on or about the first of October of '64, around in there?

A. Yes, sir.

Q. And this was aside from Mr. Thorne—I guess Mr. Thorne had started a little bit earlier—this was the first time that you had formally announced this distributorship plan to the remainder of the driver-salesmen; is that not correct?

A. That is correct.

Q. Incidentally, how many driver-salesmen were there at that time to your recollection?

MR. JACKSON: Is this prior to the conversion?

MR. BARTON: That is correct.

THE WITNESS: I believe 18 or 19.

Q. (By Mr. Barton) 18 or 19.

Your Honor, I am marking for identification General Counsel's Exhibit 18(a) which purports to be a letter addressed to Mr. M. G. Dempster from Mr. Gene G. Schilling, dated January 22, 1969. And I am also marking for identification as General Counsel's 18(b) a document bearing the title "Pepsi-Cola [123] Bottling Company of Sacramento," with commissions for the quarter 1962 to the end of 1968.

MR. JACKSON: I wonder if we may have a look at that.

MR. BARTON: Oh, I am sorry. I thought you already had a copy.

(The documents above referred to were marked General Counsel's Exhibits 18(a) and 18(b) were marked for identification.)

Q. (By Mr. Barton) Mr. Schilling, I show you General Counsel's Exhibit 18(a) and (b) for identification and ask if you are familiar with those documents.

A. Yes, sir.

Q. Was that the letter sent by you, signed by you?

A. Yes, sir.

Q. Was this document 18(b) prepared under your supervision?

A. Yes, sir.

Q. And it was sent to Mr. Dempster as an attachment to that letter, was it not?

A. This attachment, yes, sir.

Q. Yes. 18(b).

And before sending that, you checked to verify the accuracy of that, the figures on 18(b); is that correct?

A. Yes, sir.

Q. Now, this document lists all the driver-salesmen who had been in the employ of the bottling company, Pepsi-Cola Bottling [124] Company beginning, as labeled, from the fourth quarter of '62 to the end of '68; right?

A. That is correct, sir.

Q. And that document bears their dates of hire and dates of termination; is that correct?

A. Yes, sir.

Q. And you checked those figures to be sure they were accurate?

A. Yes, sir, I checked the figures, yes, sir.

Q. Now, I direct your attention to—well, I guess it's about the 33rd name on that list, Mr. George Williams.

A. Yes, sir.

Q. Do you see that?

A. Yes, sir.

Q. What starting date does that show for Mr. Williams?

A. June of 1964.

Q. And what termination date?

A. October of 1964.

Q. Now, this would be—would mean that in fact Mr. Williams did not start with your Company as a distributor, but had a brief period as a driver-salesman prior to that time; is that not correct?

A. That would be correct.

Q. I see. Do you recall now whether Mr. Williams, when he became a distributor, took over pretty much what was his [125] original route as a driver-salesman?

A. Yes, sir.

Q. He did.

Now, were you able to ascertain from that document exactly how many driver-salesmen were employed by Pepsi-Cola prior to the creation of the distributorships? Immediately prior?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

He said before 18 or 19. If you are trying to establish he was wrong, offer the document in evidence. If that is your point. I don't know what your point is.

MR. BARTON: I will leave this for a moment.

MR. JACKSON: Has the document been offered?

MR. BARTON: No, it has not.

TRIAL EXAMINER: No.

MR. JACKSON: We will offer it in that case as our exhibit.

TRIAL EXAMINER: Well, it's not your time to offer anything at this point.

MR. JACKSON: Oh, all right.

Q. (By Mr. Barton) Oh, incidentally, Mr. Willeford, had the route which had been Ken Baker's at the time of his discharge; is that not correct? [126]

A. Mr. Willeford worked in the same territory. I cannot say that the route had not been changed or revised.

Q. It was pretty much the same one; is that right?

A. He worked in that territory.

Q. Yes. And after Mr. Willeford became a distributor after a period of one year, his contract was not renewed; is that not correct?

A. That is correct.

Q. And Mr. Wagner took over his route; is that not correct?

A. I believe that's correct.

Q. As a distributor?

A. Yes, sir.

Q. And Mr. Wagner ceased operation of that route on or about the first of the year, 1968; is that not correct?

A. He ceased being a distributor as of approximately that date.

TRIAL EXAMINER: Meaning what?

THE WITNESS: I am not positive that he was on the same route.

TRIAL EXAMINER: You mean he switched back to being a driver salesman?

THE WITNESS: Mr. Wagner is a very old—he had been employed by us for a long time. He requested a distributorship. We gave it to him. At the end of a period of time he complained that his arms—he wasn't physically capable of [127] continuing on as a distributor and could he relinquish his distributorship and come back into the plant and work on our advertising department.

TRIAL EXAMINER: Not as a driver-salesman?

THE WITNESS: No, sir, he was unable to do so.

TRIAL EXAMINER: All right.

Q. (By Mr. Barton) And after Mr. Wagner stopped running that route, Mr. Simon took that over; is that not correct?

A. I believe that is correct, sir.

Q. Does Mr. Simon still run that route?

A. Yes, sir.

Q. Now, getting—

A. One second, please.

When you say: Mr. Simon is still running that route, may I say that it's possible that there may have been changes on the route, but Mr. Simon is in the same territory.

Q. In the same territory. I understand.

When you announced the distributorship scheme, when you first announced it to your driver-salesmen at that meeting, as I understand it, you told them that it was the high volume routes which were going to be turned over to distributorships. Does that square with your recollection?

A. No, sir.

Q. What did you tell them in that regard?

A. I told them that we were attempting to—we were going [128] to attempt an experiment, that we wanted to set the routes up on a basis of approximately 40,000 cases a year, 40,000 cases a year; that we didn't know at the present time how many distributors would be appointed, but that we were going to try it as an experiment.

Q. Well, did you indicate at all what routes were going to be converted?

A. No, sir.

Q. You didn't tell them at all that the low volume routes were going to be made into distributorships; is that correct?

A. No, sir.

Q. You didn't convey that idea?

A. No, sir.

Q. You didn't tell them that the men who were operating the high volume routes which were going to be converted would have them as distributorships, if they wanted them?

A. Would you say that again, please?

Q. Surely.

I gather from what you are saying you likewise don't recall telling these men that the men presently operating the high volume routes, which were going to be converted to distributorships could have them as distributorships if they wanted?

A. No, sir, we did not say that.

Q. And likewise, I guess it follows that you didn't tell them [129] if they didn't want the distributorships that those who had the high volume routes which were going to be converted, if they don't want them they could be transferred to the cities?

TRIAL EXAMINER: The city routes?

Q. (By Mr. Barton) Which were the low volume routes, I guess; is that correct?

A. I don't recall a conversation to that effect.

Q. By the way, Mr. Schilling, how long before the actual purchase of Pepsi-Cola Bottling Company by All American Beverages (known as Sam Snead) did you have contact with any one employed by or representing Sam Snead?

A. If I may, I would like to say [in answer to]* that question at the same time that Mr. Crofoot met them for the first time.

Q. Well, if you may, is that your recollection?
A. Yes, sir.
Q. And about when in time would that be?
A. I believe it was in December of 1967.
Q. What was the occasion of that meeting?
A. I—

TRIAL EXAMINER: Am I understanding that you met them then, too? You were there, too?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Okay.

Q. (By Mr. Barton) What was the occasion of that meeting? [130]
A. They came to see the bottling plant in Sacramento and to see what kind of an operation we had and to discuss the sale of it with Mr. Crofoot.
Q. Did they discuss the possible sale in your presence?
A. There was very little discussion in my presence.
Q. Did anyone from All American—

TRIAL EXAMINER: Go ahead.

MR. BARTON: Pardon me.

TRIAL EXAMINER: Go ahead.

Q. (By Mr. Barton) Did anyone from All American at that time or at any time prior to the actual purchase meet with you to discuss in detail the business operations at the bottling plant?
A. In my presence, alone?
Q. Well, alone, or with someone else. But asking questions of you.
A. Well, I was with Mr. Crofoot the day they were here.
Q. That was the only time?
A. Yes, sir.

Q. And they didn't discuss the operation of the business with you in any detail on that day, is that correct?
A. I would say primarily that is correct.
Q. And was the only time you had with them prior to the purchase by All American; is that correct?

MR. JACKSON: Just a minute, if your Honor, please, I think [131] his testimony was that was the first occasion—I believe that was the earlier question.

TRIAL EXAMINER: I think he understands English. If it is not correct, he will say so. It is a question, and this is the equivalent of cross, you know.

MR. JACKSON: The question is assumptive.

TRIAL EXAMINER: No, he finished by saying: "Is that correct?"

THE WITNESS: I must say the first time I met these gentlemen was the first time Mr. Crofoot saw them.

TRIAL EXAMINER: You don't understand the question.

Q. (By Mr. Barton) Was there any other occasion prior to the actual purchase, the signing of the purchase agreement, at which time you met with any representative from All American?

TRIAL EXAMINER: After this first time.

THE WITNESS: During the first meeting they asked if I would stay on as manager.

TRIAL EXAMINER: No. You still are not answering the question.

Did you ever meet with any representative, have a meeting of the people that bought the plant after that first meeting and before the transfer? You understand that, do you? The question?

THE WITNESS: Yes, sir. Yes, I do, sir, and my answer [132] would have to be yes, I did.

TRIAL EXAMINER: That's his question.

MR. BARTON: Thank you.

Q. (By Mr. Barton) How many times?

A. One time, to my recollection.

Q. One additional time. So you met with them twice, altogether?

A. Correct.

Q. Prior to the purchase, when was this second occasion?

A. Prior to the sale of the plant Mr. Haley came out from Springfield, Ohio to look at our operation.

Q. Do you recall about when that was?

A. No, sir, I do not.

TRIAL EXAMINER: That was in January? The sale was supposed to have occurred on January 31st.

THE WITNESS: I don't recall.

TRIAL EXAMINER: Well, it was after the first occasion and before January 31st?

THE WITNESS: I believe so.

TRIAL EXAMINER: That's close enough. What's the difference.

MR. BARTON: Okay.

Q. (By Mr. Barton) What did you discuss on that occasion?

A. Mr. Haley and I did discuss the population of our franchise, the truck averages of case sales, our per capita, the [133] general operation of the bottling plant.

TRIAL EXAMINER: "Per capita", did you say?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: What does that mean?

THE WITNESS: The number of bottles consumed, the number of bottles of Pepsi-Cola consumed by our people in a year. It is a means of measure, sir.

Q. (By Mr. Barton) How long did your discussion of Mr. Haley last?

A. Approximately a half hour.

Q. It was just that one half hour discussion?

A. Yes, sir.

Q. And during that half hour, did he examine your books?

A. No, sir.

Q. You keep the books, though? You kept them at that time?

A. The books were at our bottling plant.

Q. And it was your responsibility as general manager to oversee the keeping of those books, right?

A. No, sir.

Q. Who did that?

A. Mr. Crofoot.

Q. During this half-hour discussion, did you have any conversation with Mr. Haley about any problems you had had or were having in operating the bottling plant?

A. No, sir. [134]

Q. He didn't ask about them?

A. We discussed future plans, but there were no problems.

Q. Didn't he ask you if you had any problems?

A. No, sir.

Q. Did he discuss with you at that time the possibility of you continuing on as general manager of the plant?

A. That had been discussed previously to that.

Q. At the first meeting?

A. That is correct, sir.

Q. With Mr. Haley?

A. No, sir.

Q. Who is or was that discussed with?

A. Mr. Sarles.

Q. How long did your meeting with Mr. Sarles last?
A. About 15 minutes.
Q. It was during that 15 minute discussion that you discussed the possibility of your continuing on?
A. Correct.
Q. Did you ask him what the terms and conditions of your continuing on would be?
A. The salary was discussed.
Q. Anything else?
A. With—We discussed if William Schilling would stay on, continue on, would George Steer, our production manager stay on. [135]
Q. And he asked you about that?
A. Yes, sir.
Q. And what did you tell him?
A. I told him I thought that they would.
Q. Did he talk to these individuals?
A. I believe they did talk to Mr. Steer.
Q. And the discussion of your own future at the bottling plant, did you discuss what your future responsibilities would be?
A. My future responsibilities would be that of general manager with consultation from Mr. Haley.
Q. And did they indicate to you they were going to give you more authority than you presently had?
A. In a sense of the word, yes, sir.
Q. Did they ask you if you had any experience in labor relations problems?
A. No, sir.
Q. They did not?
You had been in charge of labor relations problems with the Company, though, had you not?
A. I had what?
Q. You had been in charge of labor relations matters at Golden State?

A. Yes, sir.

Q. So you did have some experience in that area, right? [136]

A. Yes, sir.

Q. But you didn't discuss that experience?

A. No, sir.

Q. And you remained in charge of labor relations under the new ownership, right?

A. Yes, sir.

Q. Incidentally, Mr. Schilling, at one point you had been interested in purchasing the bottling plant yourself, had you not?

A. Yes, sir.

Q. When was that?

A. I think that was in '62 or '63.

Q. Was it the same time as these labor relations problems involving Ken Baker and other driver-salesmen developed, was it not?

A. I believe—well, no, it —

When did the labor relations problems start?

Q. Well, around the first half of 1963; is that right?

A. No. I think I was trying to buy—making, negotiating a sale for the plant prior to that date.

Q. You weren't trying then during the course of these problems in the early part of '63?

A. I was always trying.

Q. You have been trying all the way through, all the way up to the purchase by All American; is that right? [137]

A. No, sir, I finally gave up.

Q. When did you give up?

A. Probably in '66.

Q. It's true, then, that during 1963 when these problems involving Ken Baker developed, these problems in-

terfered with your negotiations with Mr. Crofoot; is that not true?

A. No, sir.

Q. Well, you told some of your employees that that was a fact, had you not?

A. That labor relations problems had interfered with what?

Q. With your negotiations to purchase the plant.

A. Not in that sense of the word, no, sir.

Q. Did you tell them anything like that during this period?

A. I said that I would like to have the labor relations problems solved.

Q. Because it was interfering with your negotiations?

A. That I was trying to negotiate for the sale of the plant or the purchase of the plant.

Q. And that these problems were interfering with those negotiations; isn't that what you told these employees?

A. Not in those words, no, sir.

Q. What words did you use?

A. I was inferring that the sale of the plant—the purchase of the plant would be a lot easier if we had no labor relations problem. [138]

Q. And that was true, right?

A. It was not an important issue, no, sir.

Q. You told these people that in fact it was not true.

A. I am not saying it was not true; I am saying it was not an important issue.

Q. But it was true what you told the employees?

A. That is correct.

Q. Now, when was the first time you discussed this backpay matter involving Ken Baker with Mr. Haley of All American?

A. At 8:15 this morning.

Q. That is the first time you mentioned it at all?
A. Yes, sir.
Q. Was that the first time also that you discussed with any other representative of All American?
A. No, sir. I called Mr. Davis who is an attorney in Providence, Rhode Island on Friday of last week.
Q. And he is an attorney for All American; is that right?
A. Correct.
Q. Is he your house counsel?
A. No, sir.
Q. He just represents them?
All right.
And was that the first occasion that you discussed it with anyone from All American?
A. That's correct. [139]
Q. What did you tell Mr. Haley when you talked with him about it this morning?
A. I told him that I had called Mr. Davis Friday and that my reason for mentioning it to him today was that he is going to an All American Board of Directors' meeting this coming Tuesday and that the issue might be—Mr. Davis might mention to him that I had talked to him last Friday and that we were in the process of a National Labor Relations Board hearing concerning a Ken Baker who had been employed by Golden State Bottling Company dating back to a previous date.
Q. Was Mr. Haley surprised about this information?
A. No, he just wanted to know what the details of it were and I explained it to him.
Q. But he hadn't known about it before your call; is that right?
A. Pardon me?

Q. He hadn't known about it before your call?

A. No, sir.

Q. Did he ask you why you hadn't mentioned it before?

A. No, sir.

Q. Did he express any irritation that you had not?

A. No, sir.

Q. Did he give you any instructions on how to proceed?

A. No, sir.

MR. BARTON: I am marking for identification as General [140] Counsel's Exhibit 19, a set of three documents, the first of which purports to be a copy of a letter from Gene Schilling, addressed to William B. Luck, Esquire, bearing the date of November 14, 1969.

TRIAL EXAMINER: What was the name of the recipient?

MR. BARTON: Luck, L-u-c-k, bearing an attachment—

MR. JACKSON: What was the date of the letter?

MR. BARTON: November 14, '68.

MR. JACKSON: Thank you.

MR. BARTON: Bearing two attachments. The first, which is a two-page document bearing a heading entitled "Substitution of Attorneys", bearing the purported signature of Gene Schilling; the second attachment is an affidavit of service, bearing the purported signature of Gene Schilling.

TRIAL EXAMINER: Are these physically attached?

MR. BARTON: Yes, they are.

Q. (By Mr. Barton) Mr. Schilling, I will show you General Counsel's Exhibit 19 for identification and ask if you are familiar with the contents?

A. Yes.
Q. Did you cause those documents to be prepared?
A. These documents, I believe, were prepared by Mr. Jackson.
Q. And they were sent to you; is that right?
A. That is right, sir.
Q. For your signature? [141]
A. Yes, sir.
Q. And the first page of that exhibit for identificaton is a letter, the original of which you caused to be sent to the Clerk of the Ninth Circuit Court of Appeals, right?
A. Then what did you say, sir?
Q. You caused the original document of which that is a copy to be sent to the Ninth Circuit Court of Appeals, right?
A. That is correct.
Q. With carbon copies to the Regional Director, 20th Region of the National Labor Relations Board?
A. That is correct.
Q. To Assistant General Counsel, and other attorneys of record?
A. That is correct.
Q. And the first attachment is the substitution of attorneys which you yourself signed; is that not correct?
A. Yes, sir.
Q. And the other occasion of the signing of this document was the name changed by the firm which Mr. Jackson was a member; is that correct?
MR. JACKSON: Objected to as assuming something not in evidence.
MR. BARTON: Well, I don't think—
TRIAL EXAMINER: Objection overruled. You may answer.

THE WITNESS: Well, you will have to ask the question [142] again, please.

TRIAL EXAMINER: Will you read the question?

MR. BARTON: Wait a minute.

Will you read it, please.

(Record read.)

THE WITNESS: To my knowledge, Jackson had been with Hill, Farer & Burrill and is now with [Hodge],* Jackson, [Kumler]* & Croskey.

Q. (By Mr. Barton) I see. So he was changing firms, right?

A. I believe that is correct, sir.

Q. You wished to notify the Ninth Circuit Court of Appeals before which this case was pending of this name change, or this change of attorney representation; is that correct?

A. That is correct.

Q. The last attachment of the affidavit of service, you signed that document and sent it along with the others, right?

A. That is correct.

Q. Now, shortly after mailing those documents you received knowledge of the final decree of the Ninth Circuit, which with respect to Ken Baker was adverse to Golden State; is that correct?

A. That's correct.

MR. BARTON: I am marking for identification, a document which purports to be a copy of a letter addressed to Golden State Bottling Company, signed by M. C. Dempster, dated December [143] 1968, December 9, 1968. And that is G.C. 20 for identification.

TRIAL EXAMINER: To Golden State, not to any individual?

MR. BARTON: Pardon me?

TRIAL EXAMINER: It is addressed to Golden State and not to any individual?

MR. BARTON: That is right. Golden State. And it bears the salutation, "Gentlemen,".

(The documents above referred to were marked General Counsel's Exhibits No. 19 and 20 for identification.)

Q. (By Mr. Barton) I show you General Counsel's Exhibit No. 20 for identification, Mr. Schilling, and ask you if you ever saw the original of that.

A. Yes, sir, I have seen this.

Q. That letter came to your attention at the bottling plant, right?

A. Yes, sir.

Q. And you read the contents?

A. Yes, sir.

TRIAL EXAMINER: Who is Mr. Dempster? This is the second time I have heard his name.

MR. JACKSON: He is compliance officer of the 20th Region.

TRIAL EXAMINER: Okay.

MR. BARTON: Maybe we can just stipulate that. [144]

MR. JACKSON: It might save time with a lot of this testimony and we stipulate to the fact a lot of this was done under the name of Golden State Bottling Company, because we were totally unaware of that, that there had been any change in the parties.

MR. BARTON: I don't want any stipulation right now, your Honor.

MR. JACKSON: I can produce all sorts of correspondence.

TRIAL EXAMINER: Who is we?

MR. JACKSON: Myself and my office.

Q. (By Mr. Barton) Now, that letter, G.C. 20, requested you to take certain action, did it not?

A. The letter what?

Q. Requested you to take certain action? Requested certain action be taken?

A. Oh, yes, sir.

Q. First, it requested you to sign copies of a notice to all employees of that posted in and around the plant; is that not correct?

A. Yes, sir.

Q. It also requested that you return one copy of the signed notice, along with the certificate of posting to the Regional Office in San Francisco; is that not correct?

A. Yes, sir.

Q. And you signed and posted those notices as directed, right? [145]

A. Yes, sir.

MR. BARTON: I will mark as General Counsel's Exhibit 21(a) for identification a document which purports to be an exhibit of posting, signed by G. C. Schilling; and as General Counsel's Exhibit 21(b) for identification, a document which purports to be notice to all employees, bearing the signature of Gene Schilling.

(The documents above referred to were marked General Counsel's Exhibits Nos. 21(a) and (b) for identification)

Q. (By Mr. Barton) Mr. Schilling, I show you G.C. 21(a) and (b) for identification and ask if you have ever seen those documents before?

MR. JACKSON: I wonder if we could see them now, counsel.

THE WITNESS: Yes, sir.

MR. BARTON: You have seen those.

Q. (By Mr. Barton) And you signed each of those, right?

A. Yes, sir.

Q. It is your signature?

TRIAL EXAMINER: Do they have dates on them?

MR. BARTON: Yes. I am sorry.

THE WITNESS: Yes, sir.

Q. (By Mr. Barton) G.C. 21(a) bears a date, 11 December of '68, and the same date is on G.C. 21(b) for identification.

TRIAL EXAMINER: Thank you. [146]

Q. (By Mr. Barton) And you returned those to the 20th Region in San Francisco, as directed, is that correct?

A. Yes, sir.

Q. And if I may refer you back again just briefly to G.C. 20 for identification, I note that that letter also requests you to make an offer of reinstatement to Ken Baker as directed by the court decree; correct?

A. Yes, sir.

Q. And in fact you mailed the letter on this, offering him reinstatement to the position of driver-salesman; is that correct?

A. That is correct.

TRIAL EXAMINER: When?

MR. JACKSON: 11 December 1968 was the date of the letter, I believe.

Q. (By Mr. Barton) That does square with your recollection, Mr. Schilling, is that correct?

A. That is correct.

TRIAL EXAMINER: As a driver-salesman did you say?

MR. BARTON: As a driver-salesman.

MR. JACKSON: That is correct, Mr. Hearing Officer.

TRIAL EXAMINER: I didn't hear what you said.

MR. BARTON: Yes.

TRIAL EXAMINER: Mr. Jackson.

MR. JACKSON: I said it was correct. He was offered [147] reinstatement as a driver-salesman.

TRIAL EXAMINER: I assume that letter is available?

MR. BARTON: Yes. I don't have it ready at hand; I didn't intend to introduce it. I pressumed that Mr. Jackson would.

TRIAL EXAMINER: By whom was it signed and on behalf of whom?

MR. JACKSON: Signed by Mr. Schilling on behalf of Mr. Schilling, Pepsi-Cola Bottling Company of Sacramento.

TRIAL EXAMINER: 11 months after the sale?

MR. JACKSON: That is correct.

Again, I offer by way of explanation, and we will prove this later—

TRIAL EXAMINER: I hope you will because I am getting more confused by the minute.

MR. JACKSON: The fact we didn't have any—we were totally unaware of this transfer.

MR. BARTON: I would object to a statement by counsel.

TRIAL EXAMINER: I know counsel's statements do not constitute evidence, but while we are on this subject of the specification, paragraph 10(a) alleged or alleges that you, Mr. Jackson, had been an attorney for a company—for All American at all times material herein. I am paraphrasing it, but do you deny that?

At what point in time did you become an attorney for All [148] American, if ever?

MR. JACKSON: I was unaware of the fact that the Company was owned by All American until this last November, I believe it was, when we were preparing the answer for filing.

TRIAL EXAMINER: The answer to the specification?

MR. JACKSON: Yes, the answer to the backpay specification. It was only then that we discovered, or I learned that there had been a change in ownership and there was several telegrams to the Region requesting an extension of time to clarify this.

TRIAL EXAMINER: You told me at the opening of this proceeding you were representing All American.

MR. JACKSON: At the present time, that is quite correct.

TRIAL EXAMINER: And my question was: When did you start representing them?

MR. JACKSON: Technically speaking, I think our representation commenced at that time.

TRIAL EXAMINER: When you found out, you mean you started representing them without any authorization from them?

MR JACKSON: Well, if I may explain, sir, we were retained by the Bottlers' Association. The Bottlers' Association technically speaking, are our clients. The Pepsi-Cola Bottling Company or the Pepsi-Cola Bottlers in San Francisco is a member of that Association and by virtue of its membership we have represented the Pepsi-Cola operation in Sacramento in [149] this proceeding from its inception.

Now, of course, when the plant changed hands the successor corporation became a member of the Association at the same time. However, we were unaware of that and continued to deal with Mr. Schilling at the managerial level without knowledge of this and continued to represent the Bottling Association.

TRIAL EXAMINER: Was there correspondence?

MR. JACKSON: There was correspondence, but I —this was with Mr. Schilling. There was a great deal.

TRIAL EXAMINER: Wouldn't he use the letterhead of All American rather than Golden State?

MR. JACKSON: Pepsi-Cola letterhead. And I don't recall frankly, that the name "All American" appeared on any of it.

TRIAL EXAMINER: All right. I just asked for your statement as an attorney of record here when you started representing All American.

MR. JACKSON: Well, actually, I think we started—

TRIAL EXAMINER: As a member of the Bottling Association, if you want to put it that way.

MR. JACKSON: Actually, the fact is that we represented them from the time of the takeover.

TRIAL EXAMINER: But you didn't know it.

MR. JACKSON: No, that is the essence of the thing.

TRIAL EXAMINER: When do you state you learned it for the first time that you were representing them as a member of [150] that Association?

MR. JACKSON: That was approximately November 1969 at which time we requested an extension of time to answer in order to clarify the question of our representation, exactly that point. And it was at that time we were assured that we would continue to

represent this bottler and at the same time to represent Golden State to a conclusion in this proceeding, but it was precisely for that purpose.

TRIAL EXAMINER: I take it you are not now representing Golden State as a member of the Association?

MR. JACKSON: That is correct.

TRIAL EXAMINER: When did that change occur?

MR. JACKSON: Well, it occurred at the time of the clarification.

TRIAL EXAMINER: And how was that handled? Was anything done or did it just happen by osmosis?

MR. JACKSON: No, no. I wrote a letter and I'll be glad to put it in evidence. I wrote a letter to both All American and to Golden State explaining this position. Both parties got together and requested that we continue to represent them both. I explained the certain conflicts that arose by virtue of this situation. They resolved that matter between themselves and each requested that I continue to represent them both to the conclusion of this proceeding.

TRIAL EXAMINER: All right. [151]

MR. JACKSON: But until that time being we had assumed that Golden State—

TRIAL EXAMINER: You only represented the Bottling Association and Golden State, let's say, before the National Labor Relations matters?

MR. JACKSON: That would be correct.

TRIAL EXAMINER: You had nothing to do with the negotiations of, or the transfer of it?

MR. JACKSON: Nothing whatsoever.

TRIAL EXAMINER: As attorneys.

MR. JACKSON: No.

TRIAL EXAMINER: For the Association.

MR. JACKSON: Nothing. And as I say, we had no knowledge of it at all.

TRIAL EXAMINER: Okay.

MR. JACKSON: As far as I am aware, the Association had nothing to do with the Association.

TRIAL EXAMINER: Well, I wouldn't assume they would have, but they must have received notice of a change of membership.

MR. JACKSON: This is entirely possible that they were aware of change in ownership.

TRIAL EXAMINER: All right, go ahead.

I say they must have. Maybe they didn't. They should have, let's put it that way.

MR. JACKSON: Surely, I would certainly agree with that. [152]

Q. (By Mr. Barton) Continuing, Mr. Schilling, with the sequence of events shortly after receiving this communication from the Regional Office, you met with Mr. Dempster, the compliance officer from that office and Mr. Jackson, to discuss computation of the backpay owing Mr. Baker; is that correct?

A. That is correct.

Q. This was on or about the 8th of January 1969?

A. Correct.

Q. And at this meeting you gave him what evidence you had as you were required to do by the court order relating to what Ken Baker might have earned during the period; is that not correct?

A. I told him I would supply that information.

Q. Indeed, you felt you were compelled to supply that information?

A. Pardon me?

Q. You considered yourself compelled to supply that information, did you not?

A. Yes.

Q. And was that the only meeting you had with Mr. Dempster?

A. No, sir. We met with Mr. Dempster on one other occasion on a future date.

Q. And that was after you had received correspondence suggesting what the Regional Office considered to be a fair [153] settlement of the backpay question, did you not?

A. That was a later date, yes, sir.

MR. BARTON: Now, your Honor, I am marking as General Counsel's Exhibit 22 for identification, what purports to be a carbon copy of a letter addressed to Morton B. Jackson from M. C. Dempster, compliance officer, bearing the date March 26, 1969.

MR. JACKSON: What was the date, please?

MR. BARTON: March 26th, 1969.

Indicating a carbon copy being sent to Mr. [Gene]* Schilling.

(The document above referred to was marked as General Counsel Exhibit No. 22 for identification.)

Q. (By Mr. Barton) I show you General Counsel's Exhibit 22 for identification and ask you to identify and examine that document.

A. I have seen this letter, yes, sir.

Q. You received a copy of that letter in the mail?

A. A copy of it, yes, sir.

Q. And you read the contents when you received it?

A. Yes, sir.

Q. And you became aware once you read the contents that the Regional Office considered that your Company owed Mr. Baker a considerable sum of money; is that not correct?

A. Yes, sir.

Q. And I take it after receiving that letter, you were in [154] touch with Mr. Jackson; is that correct?
A. Yes, sir.
Q. And you considered the possibility of whether to settle up or proceed in legal proceedings; correct?
A. I discussed this with Mr. Jackson, yes, sir.
Q. And ultimately you reached the conclusion that you chose not to settle?
A. Pardon me?
Q. Ultimately, you reached the conclusion you preferred not to settle; is that right?
A. That is correct.
Q. And you instructed Mr. Jackson to communicate that decision to the Regional Office in San Francisco?
A. Correct.
Q. I guess you were aware that one consequence of this decision was the result of some further legal expense, right?
A. Not further legal expense, no, sir.
Q. It wouldn't cost you anything if you had to go to a formal hearing? You would have to—The corporation would have to supply their attorneys for that proceeding, right?
A. Those expenses are paid by the Association.
Q. The Bottling Association picks up the tab on all of that?
A. Yes, sir.
Q. Doesn't it matter how much litigation? How frequently they pick up the tab if you decide to go ahead with legal [155] action; is that right?
A. That is right.
Q. How many members are in that Association?
A. I believe all the bottling plants in the Sacramento area.

TRIAL EXAMINER: We don't know how many plants there are in the Sacramento area.

THE WITNESS: I see.

TRIAL EXAMINER: Roughly.

THE WITNESS: Six or seven.

Q. (By Mr. Barton) What are the monthly dues or fees to the Association? Is that it?

A. We pay dues to the Association, yes, sir.

Q. Monthly dues?

A. No, sir.

Q. Yearly?

A. As needed, sir.

Q. I see. Are contributions as needed equal from all members?

A. No, sir.

Q. What determines the size of the shares?

A. It was based on the number of trucks operated by each bottling plant.

Q. Then you total up the number of trucks and divide that into the number of trucks operated by each to get a percentage; is that right?

A. No. We were—our dues are determined by the number of [156] trucks. Each bottler pays the same amount of dues per truck.

Q. Per truck?

TRIAL EXAMINER: Well, it comes out to the same thing.

MR. BARTON: Yes.

Q. (By Mr. Barton) Who administers the finances of the Bottlers' Association, Mr. Schilling?

A. I believe Mr. Jack Sellers.

Q. Who is Jack Sellers?

A. He is, I believe, president of Coca-Cola Bottling Company of Sacramento.

Q. And he lets everyone know when you need more money?

A. Yes, sir.

Q. And he keeps the books, records and receipts and disbursements; is that right?

A. Yes, sir.

Q. And is his responsibility memorialized in any kind of articles [of incorporation]* or agreement or anything of that nature?

A. I don't follow you, sir.

Q. Well, the rules under which he must operate and the members must operate, are they written down anywhere?

A. Not to my knowledge.

Q. Are there such rules?

A. Pardon me?

Q. Are there such rules? [157]

A. No, sir.

Q. No rules whatsoever?

Are there any rules regarding what kind of expenses the membership must draw from the funds in that exhibit there?

A. No, sir.

Q. You could draw anything out of there whatsoever?

A. It has not happened.

Q. But you could if you wanted to?

A. I doubt it.

Q. What would stop you?

A. I don't know what you have reference to, sir.

Q. Well, okay.

Let's assume that you had a fire at your bottling plant. I guess you did; right?

A. That is right.

Q. That required considerable repair expenditure?
A. That is right.
Q. Did you draw that repair expenditure out of the bottling funds?
A. No, sir.
Q. If you wanted to, could you?
A. No, sir.
Q. What made you decide that you could not?

MR. JACKSON: I have an objection to this line of testimony, but there is nothing whatsoever that indicates whether [158] they have to furnish—any supposition that the members are entitled to withdraw any funds from the Association.

MR. BARTON: That has been Mr. Schilling's testimony, I believe, your Honor.

TRIAL EXAMINER: I don't know if I would call it withdrawing funds, but there has been testimony that—he just got through saying that they pay the legal expenses. They pay the lawyers for this fee.

MR. JACKSON: That the Association does.

TRIAL EXAMINER: Right.

Well, in that sense, Mr. Barton is referring to withdrawing funds. In other words, that becomes a fund, if you want to call it that.

MR. JACKSON: Yes, that is true.

TRIAL EXAMINER: That is used to pay you, for example, to represent the Association in labor matters.

MR. JACKSON: That is correct. We are paid from that.

TRIAL EXAMINER: That is withdrawal of funds in the sense he is using it, in this particular essence for the benefit of All American, I assume. Is that not your point?

MR. BARTON: That is correct.

MR. JACKSON: I didn't so infer.

TRIAL EXAMINER: But he is trying to elicit from the witness under what circumstances this can be done. Obviously, there must be some documents which set forth the arrangement. [159]

MR. JACKSON: Perhaps I used the term "withdrawal" rather than [disbursement].*

TRIAL EXAMINER: That is why he referred to letters of incorporation or something like that. There must be an Association agreement which sets forth the procedure under which this occurs.

THE WITNESS: This was in agreement to the number of trucks that we each operated and that we would pay X-number of dollars per truck.

Q. (By Mr. Barton) So there were regulations about payments in, but nothing about payments out?

A. The payments out were to pay Mr. Jackson's legal fees.

TRIAL EXAMINER: Yes.

Q. (By Mr. Barton) Exclusively?

TRIAL EXAMINER: Who decided that? How did that come about?

THE WITNESS: That was as I recall, by a vote of the membership.

Q. (By Mr. Barton) And is that the only report of the membership that has been made? Is that the only decision that has been made?

A. Considering—Concerning fees, yes, sir.

Q. Or any kind of disbursements from the fund at all?

A. I believe that we had one disbursement made, a minor one to a campaign fund, but I don't recall the details. [160]

Q. A political campaign?

A. Or it may have been just—It was a settlement among the bottlers.

Now, the only disbursements out of this fund, to my knowledge, have been to Mr. Jackson.

Q. I would assume the sole purpose of that Bottlers' Association is to pay Mr. Jackson; is that correct?

A. That is correct.

Q. So this arrangement has been drawn up—How long has it been in existence?

A. I would say 1960. I am not positive.

Q. 1960. That is all the bottling companies have been retaining Mr. Jackson as their attorney in labor relations matters since 1960?

A. The Association, originally it retained a firm of Hill, Farer & Burrill.

Q. Mr. Jackson was a member of that firm, right?

A. I believe he was.

Q. He has been handling the labor relations problems for the Bottling Association since 1960?

A. He was one of the attorneys.

Q. One of them.

And when you formed that Association, was the idea then to limit its function to [handle]* the payments of expenses incurred in the course of labor relations problems? [161]

A. Well, I would say that's correct.

Q. So the notion was, I gather from what you're saying, that the bottling companies wanted to get together in labor relations matters, right?

A. Yes, sir.

Q. In any labor relations problem which affected one, they figured this was everybody's business?

A. That affected one what?

Q. If it affected one, it affected all. Is that what they thought, was it not?

A. It's possible.
Q. So then, it would be correct to say that all disbursements from that fund concerned payments of legal fees incurred as a result of labor relations problems; is that correct?
A. Correct.
Q. So I would assume, then, as a consequence of continuing problems you have had as a result of this unfair labor practice matter, assessments have been frequent and probably fairly substantial; is that correct?
A. They are not as frequent as they were.
Q. When were they the most frequent?
A. When the Association was first formed.
Q. In 1960?
A. Whenever the Association was first formed.
Q. You testified first that it was 1960; is that right? [162]
A. I think it was approximately that time. I'm not positive.
Q. And they continued to be pretty heavy during the course of the original litigation in this matter; is that right?
A. That is correct.
Q. And on through the court proceedings, 1965 and '66; is that right?
A. I believe that's correct.
Q. And it was kind of a lull and they tapered off a little?
A. Yes.
Q. And then they picked up again?
A. I don't know that they picked up again.
Q. When was the last time you were assessed?
A. I believe three months ago.

Q. What was the amount of that assessment?
A. Our assessment was $1,088.16, I believe.
Q. And when was the assessment? Immediately prior to that?
A. I would have to look at the records. I believe three months before that.
Q. Was that about the level the assessment would run, about a thousand bucks every three months?
A. I would have to take a look at our records.
(Short recess.)
TRIAL EXAMINER: The hearing will be in order.
Q. (By Mr. Barton) I would get a—It would be my assumption, though, fairly consistently the assessments on a yearly [163] basis were up in the thousands of dollars; is that not right?
MR. JACKSON: In respect to this company or all of the members?
MR. BARTON: In respect to Mr. Schilling's bottling plant.
THE WITNESS: With the Pepsi-Cola Bottling Company, the assessments were in excess of a thousand dollars a year, yes sir.
Q. (By Mr. Barton) Probably several thousands each year?
A. Yes.
Q. And that was yearly throughout the period of its existence?
A. Not throughout the period of the existence, no, sir.
Q. When were they not at that level?
A. At the original formation of the Bottlers' Association, there were no assessments.
Q. And once you started assessments that was when?
A. I'd have to look. I think '62, '63, around in there.

Q. And after that date, up to the present time, the yearly assessments have been up to a thousand dollars a year?

A. They have been over a thousand dollars a year.

Q. Several thousand?

A. I don't know what several thousand means. Three, four . . .?

Q. Three, four or five thousand each year.

And these assessments, I presume, were recorded in the Company's books each time they were paid out, right? [164]

A. Yes, sir.

Q. And when you record expenditures in your books, do you note down what expenditure, each expenditure is for?

MR. JACKSON: There is no evidence that this witness records any expenditures?

MR. BARTON: He just testified he did in the preceding question.

MR. JACKSON: I believe he testified earlier—

MR. BARTON: I will ask him again.

Q. (By Mr. Barton) Mr. Schilling, are expenditures recorded in the Company's books?

A. Expenditures are recorded in the Company's books.

MR. JACKSON: You are talking about the Company, not the Association?

MR. BARTON: The Company.

MR. JACKSON: I beg your pardon.

Q. (By Mr. Barton) And when these expenditures are recorded, is the nature of the expenditure recorded?

A. They are recorded—they are categorized, yes, sir.

Q. And is this—each expenditure labeled?

A. Pardon me?

Q. Is this expenditure labeled?

A. The Association expenses go under dues and memberships.

Q. And are these specified?

A. In a lump sum, yes, sir. [165]

Q. Do the companies belong to other associations?

A. Yes, sir.

Q. Which ones?

A. The bottling company?

TRIAL EXAMINER: Yes.

THE WITNESS: We belong to the National California Growers' Association.

The Northern California Growers' Association, pardon me.

Q. (By Mr. Barton) What are your dues to that Association?

A. I believe those dues are either two or four hundred dollars a year.

Q. What else?

A. Belong to the Northern California Valley Association.

Q. How much are those dues?

A. They vary.

Q. What is the range?

A. In the neighborhood of 40 to 50 dollars a month?

Q. What else?

A. The Pepsi-Cola Bottlers' Association, the national association.

Q. Any dues to that?

A. Yes, sir. And our dues to that are—I would have to check the records to be sure—but I believe our dues to that are in the neighborhood of $2,000 a year.

Q. What else? [166]

A. We belong to the California Pepsi-Cola Bottlers' Association.

Q. What dues do you pay there?

A. Our dues there are in the neighborhood of $750 a year.

Q. What else?

A. The California-Nevada Bottlers' Association.

Q. What dues then to them?

A. Our dues there are, I believe, approximately $400 a year.

Q. Anything else?

A. There is a list at the Chamber of Commerce of those if you are interested in all those, everything we belong to, sir.

Q. When you make out your payments and you make payments in the book, you mark down each payment as it goes out, right?

A. That is correct.

Q. And do you label it?

A. The check is made out to whoever it's payable to.

Q. In the book?

A. Yes, sir.

Q. Do you label who it is going to?

A. That is part of our book ledger.

Q. Incidentally, you said the assessments are based upon the number of trucks each bottler operates. When you convert or converted to distributorships, are distributors' trucks [167] counted?

A. These assessments were set back in 1962 or '63 and have never changed since that date.

Q. One company is not bigger than the other? Relatively it didn't matter?

A. That is correct.

Q. The same assessment.

Now, I guess these assessments have been taken a bit out of each of the other members; is that correct?

A. That is correct.

Q. Do any of them put up a squawk about the continuation of your legal expenses relating to this case?

A. No, sir.

Q. Did they ever try to persuade you to try to put an end to it?

A. No, sir.

Q. Did you advise Mr. Haley of your membership in the Bottling Association?

A. Mr. Haley asked me at one point what that check was for and I told him that was our membership in the Sacramento Bottlers' Association.

Q. When did he ask you that?

A. He said that was fine.

Q. I said: When did he ask you that?

A. Pardon? [168]

Q. When did he ask you that?

A. Probably a year ago.

Q. Did you ask him what the Association did? Did he ask you what the Association did?

A. No, sir.

Q. Incidentally, Mr. Schilling, you didn't have any conversations with Mr. Jackson during the last recess, did you?

A. Well, we both said we are going down to the end of the hall.

Q. Did you have any discussions with him?

A. No, sir.

Q. All you said was: You were going down to the end of the hall?

A. He said he was going to make a phone call.

Q. You didn't talk to him for any period of time?

A. No, sir.

MR. BARTON: I would offer at this time General Counsel's Exhibits No. 19, 20, 21(a) and (b), and 22 in evidence at this time.

TRIAL EXAMINER: Any objection?

MR. JACKSON: No objection.

TRIAL EXAMINER: They are received.

(The documents above referred to, heretofore marked General Counsel's Nos. 19, 20, 21(a) and (b) and 22 were received into evidence.) [169]

MR. BARTON: I have no further questions of Mr. Schilling.

MR. JACKSON: It is just noon, Mr. Trial Examiner.

I believe we probably should take the noon break at this time if that is convenient for the rest of you.

TRIAL EXAMINER: All right.

I don't care.

I just have one question: I might as well as it now.

MR. JACKSON: Surely.

TRIAL EXAMINER: It may lead to others.

Were you an officer of Golden State?

THE WITNESS: Yes, sir, I believe I was.

TRIAL EXAMINER: What office?

THE WITNESS: Secretary.

TRIAL EXAMINER: Secretary. What connection, if any, did you have with Golden State after the transfer, in this sale to All American?

THE WITNESS: No connection at all, sir.

TRIAL EXAMINER: When did you stop being an officer of the company?

THE WITNESS: At the transfer.

TRIAL EXAMINER: All right, we will adjourn for lunch until 1:00 p.m.

(Whereupon, the luncheon recess was taken, to reconvene at 1:00 p.m., same day.) [170]

AFTERNOON SESSION

1:00 p.m.

TRIAL EXAMINER PIPER: The hearing will be in order.

Whereupon,

EUGENE SCHILLING

was recalled as a witness by and on behalf of the General Counsel, having been first duly sworn, was examined and testified further as follows:

CROSS-EXAMINATION

Q. (By Mr. Jackson) Mr. Schilling, prior to the sale of the Sacramento Bottling operation to All American,—I will refer to All American rather than Sam Snead so we know what we are talking about—it's the same company—prior to the sale of the Pepsi-Cola Bottling operation to All American, were you an officer of Golden State?

A. Yes, sir.

Q. And at the time of this sale, what was your position in that respect?

A. At the time of the sale I was secretary of the Golden State.

Q. Did you own any stock in Golden State Bottling Company at that time?

A. No, sir.

Q. Did any member of your family, to your knowledge, ever own any stock in Golden State Bottling Company? [171]

A. No, sir.

Q. And at the time of the sale, did you continue or did your position as an officer of Golden State terminate?

A. It terminated at the sale, yes, sir.

Q. Have you at any time since that position held any—or since that date held any position whatsoever with Golden State Bottling Company?

A. No, sir.

Q. Or any member of your family, to your knowledge?

A. No, sir.

Q. At the time of the sale, was your employment by Golden State Bottling Company also terminated?

A. That is correct.

Q. And have you had any relationship of employment or business relationship with Golden State since the sale?

A. No, sir.

Q. Subsequent to the sale, did you become employed by All American?

A. I became employed by All American at the sale.

Q. In other words, your employment by Golden State ceased and your employment by All American commenced?

A. Yes.

Q. Is that correct.

Were you at that time made an officer of All American?

A. No, sir. [172]

Q. Have you ever been an officer of All American?

A. No, sir.

Q. Of the corporation, that is?

A. No, sir.

Q At the time of the sale, did you own any particular stock in All American?

A. No, sir.

Q. At the time of the sale, did you have an employment contract with All American?

A. No, sir.

Q. Under what circumstances, describe in your own words the circumstances under which your employment by All American came about.

A. I was asked by All American if I would continue on as general manager of the Pepsi-Cola Bottling Company of Sacramento, division of All American, at a specified salary. There was no work agreement or work contract at the time.

Q. Was anything said at that time about your employment being on a sort of a probationary or perhaps trial basis? And if things worked out, it would later be formalized or something to that effect?

A. They said: Let's get to know each other a little bit and see how you work with us and how we work with you, and if everything is satisfactory at a later date, we will draw up a work contract. [173]

Q. Was that later done?

A. Yes, sir.

Q. When was your employment contract with them, or when did you receive your employment contract from them?

A. In February '69.

Q. That would be a year following the sale?

A. The year following. [174]

* * *

Q. Now, inviting your attention, Mr. Schilling, to this—to certain exhibits that were shown to you by the General Counsel this morning, General Counsel's Exhibit Nos. 20, 21, 22, also General Counsel's Exhibit No. 19, 19 being a copy of a letter signed by you, addressed to the Clerk of the Court of Appeals, attaching a substitution of attorney, you may recall—

Perhaps it would be a good idea to have the actual documents.

TRIAL EXAMINER: He has got them. I gave them to him.

MR. JACKSON: Thank you.

Q. (By Mr. Jackson) I invite your attention to the fact that on the letter to Mr. Luck, which is General Counsel's 19, your signature appears. You appear to have signed on behalf of Golden State Bottling Company.

A. Yes, sir.

Q. Then referring to General Counsel's Exhibit 20—well, [177] 20 is a letter addressed to you by Mr. Dempster. It's addressed to you at Golden State Bottling. But referring particularly to 21(a) and 21(b), a notice to all employees, it appears that both are signed by you on behalf of Golden State Bottling Company.

A. That is correct.

Q. Did you at the time any of these exhibits were signed, did you actually have any authority to act on behalf of Golden State Bottling?

A. No, sir.

Q. And can you explain why it was that you signed on behalf or you purportedly signed on behalf of Golden State Bottling Company on those occasions?

MR. BARTON: Object to state of mind.

MR. JACKSON: I think he's perfectly entitled to explain why he signed the documents in that manner.

TRIAL EXAMINER: Objection overruled.

You may answer.

THE WITNESS: Mr. Jackson, I am not an attorney. All of these labor problems started under the name of Golden State Bottling Company, which to me is the Pepsi-Cola Bottling Company. These letters were prepared either by you or the National Labor Relations

Board; the contents of them I was aware of, I assumed that inasmuch as they were started against the Golden State Bottling Company they would be concluded [178] against the Golden State Bottling Company.

Frankly, I wasn't aware of the fact that I was signing Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento. As a matter of fact, on Exhibit G.C. 21(a), the bulletin which we posted on the bulletin board, that is, the "Employer's Golden State Bottling Company, Employer, d/b/a Pepsi-Cola."

I shouldn't say that. G.G. Schilling, President. I was referring to Gene G. Schilling, president of Pepsi-Cola Bottling Company, a division of All American Beverages. Frankly, I just—I wasn't aware of this.

Q. Well, prior to that a letter of transmittal to Mr. Luck, which is General Counsel's Exhibit No. 19—

Do you have that?

A. Yes, sir.

Q. Was that letter prepared by you?

A. No, sir.

Q. Do you know who prepared it?

A. I believe you did, sir.

Q. All right. Now, do you recall also at my request, Mr. Schilling, sending a letter of reinstatement or an offer of reinstatement to Mr. Baker on behalf of Pepsi-Cola Bottling Company?

A. Yes, sir.

Q. Did you do that at my request and upon my advice? [179]

A. Yes, sir.

MR. JACKSON: If your Honor please, I wish to have this marked as Respondent's—

TRIAL EXAMINER: All right, just mark it R-1.

MR. JACKSON: All right, R-1.

TRIAL EXAMINER: R-1.

(The document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Jackson) Mr. Schilling, I hand you a document which has been marked Respondent's Exhibit 1 and purports to be a copy, I take it, of a letter addressed to Kenneth L. Baker, dated [December]* 11, 1968 and signed "Pepsi-Cola Bottling Company, Gene G. Schilling, President."

A. That is correct.

Q. And I ask you if you can identify that for us?

A. I identify this letter.

Q. Is that the letter of reinstatement sent to Mr. Baker upon my request and upon my advice?

A. Yes, sir.

MR. JACKSON: We will offer Respondent's Exhibit 1, Mr. Trial Examiner.

MR. BARTON: No objection.

TRIAL EXAMINER: It may be received.

(The document above referred to, heretofore marked Respondent's Exhibit No. 1 for identification, was received into evidence.) [180]

Q. (By Mr. Jackson) Mr. Schilling, do you recall the first time you and I had any discussion concerning the fact that the bottling company had been sold to All American Beverage Company?

A. I believe I do, sir.

Q. And do you recall when that occurred?

A. I believe it was early in December.

Q. 1969?

A. Yes.

Q. And was that the first time that you advised me that the Pepsi-Cola operation had been sold to Golden State to All American?

A. That is correct, sir.

Q. Mr. Schilling, with respect to the representation of Pepsi-Cola during the course of the unfair labor practice proceedings that commenced during the spring or summer of 1963, who was the attorney that represented Pepsi-Cola during the initial stages of that proceeding?

A. His name was Edward Franzen, F-r-a-n-z-e-n.

Q. And do you recall at what stage of the proceedings I came into the picture?

A. It was a considerably later date. I don't recall exactly when.

Q. Approximately when, Mr. Schilling, was the Sacramento Bottlers' Association first formed? [181]

A. I think probably in the neighborhood of 1960. [182]

* * *

THE WITNESS: No. I represented the Pepsi-Cola Bottling Company in that Association.

TRIAL EXAMINER: And have since when?

THE WITNESS: Since its inception.

TRIAL EXAMINER: Oh, I think that is adequate foundation.

Q. (By Mr. Jackson) As a matter of fact, Mr. Schilling, you were among the persons who founded the Association, were you not?

A. Correct.

Q. And you participated in the discussions with the other bottlers in town which led to its inception?

A. That is correct.

Q. And it was among the consequence of those discussions the purposes were formulated and the organization itself came into being; is that correct?

A. Correct.

Q. All right, now, continuing on, of course those continued to be the general purposes of the Association, or has there been some change in them?

A. Those are the general purposes of our discussions. We [183] discuss our problems. Whatever problems arise, we discuss at the meetings.

Q. And do matters of labor relations and industrial relations also form part of that general context of discussion?

A. Yes, they do. [184]

* * *

REDIRECT EXAMINATION

Q. (By Mr. Barton) Mr. Schilling, in response to a question from Mr. Jackson you testified that your first discussion with him regarding the sale of the bottling plant occurred in early December of 1969. Do you recall that testimony?

A. Yes, sir.

Q. What occasioned that sudden release of informaton?

A. I was gone from the plant during the month of November and at that time, during my absence from the plant, Mr. Jackson somehow was informed of the All American Beverages becoming the owner of Pepsi-Cola Bottling Company.

Q. He didn't get information from you in the first instance; is that right?

A. No, sir. [187]

* * *

Whereupon,

LEONARD WILLEFORD

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Barton) Will you spell your full name for the record, please, Mr. Willeford.

A. Leonard Willeford, W-i-l-l-e-f-o-r-d.

Q. What is your present address?

A. 6001 Valley Way, Sacramento.

Q. And your present occupation?

A. I work for the Skylon Corporation.

Q. Have you ever worked for Pepsi-Cola Bottling Company of Sacramento?

A. Yes.

Q. When to when?

A. Early summer of 1962 to October 1965.

Q. What position were you in when you started with Pepsi-Cola?

A. Driver-salesman.

Q. How long did you retain that position?

A. As a driver-salesman, until October of 1964.

Q. And then was—what was your status then?

A. From October 1964 to October 1965 I was an independent [194] distributor for the Golden State Bottling Company.

Q. And what was the reason for your eventual termination?

A. I was fired.

Q. Was there a reason given?

A. I wasn't taking care of any accounts; I was skipping stops and wasn't giving them the service I was supposed to.

Q. In your opinion, were these allegations correct?

A. No, sir.

TRIAL EXAMINER: Do you know who fired you?

THE WITNESS: Mr. Gene Schilling.

Q. (By Mr. Barton) Before beginning as a distributor, Mr. Willeford, do you recall a meeting in which a decision to convert to distributorships was announced?

A. I recall the meeting but not exactly what time or date it occurred.

Q. What is your best recollection as to when it was in relation to the time you began as a distributor?

TRIAL EXAMINER: Before, he means.

THE WITNESS: Oh, approximately a week or two. Maybe three.

Q. (By Mr. Barton) Before or after?

A. Before I became a distributor.

Q. And where was this meeting?

A. It was held at the Pepsi-Cola Bottling Company at 1100 "Q" Street, Sacramento. [195]

MR. JACKSON: I'm sorry, I didn't hear the answer.

THE WITNESS: [11]* "Q" Street.

TRIAL EXAMINER: The meeting was held at the Pepsi-Cola Bottling Company at 11 "Q" Street, Sacramento.

Q. (By Mr. Barton) What location within the plant?

A. In one of the offices, main offices.

Q. And who was present on that occasion?

A. The driver-salesmen, the route supervisors.

Q. Who were they?

TRIAL EXAMINER: You mean names?

MR. BARTON: Yes.

THE WITNESS: Henry Miller was one of the supervisors, Donald Glavich, Ed Varesconi.

Q. (By Mr. Barton) Who else was present?

A. Mr. Gene Schilling, Dwight Smith.

Q. Who is Dwight Smith?

A. He was then, I believe he was market coordinator for the Pepsi-Cola Bottling Company.

Q. Anybody else present that you recall?
A. No, sir.
Q. Do you recall what was said on that occasion and by whom?
A. The meeting was called to discuss a possible changing of the routes and developing them into distributorships.
Q. Was this announced?
A Yes. [196]
Q. By whom?
A. Mr. Gene Schilling.
Q. What else was said?
A. He said that some of the routes were going to be made into distibutorships and that anybody wishing to have a distributorship would please contact him after the meeting was over and that he would set up appointments to talk to them about this, that some of the routes would not become distributorships because their case sales weren't large enough to allow this, so if you didn't want to become a distributor, you could still work for the Pepsi-Cola Company as a regular driver, salesman.

But the men on the routes at the present time had first choice as to whether they wanted to become a distributor or not. If they did not, they could resume their job as a driver-salesman, possibly being switched to another route.
Q. Do you recall anything further that was said?
A. There was a lot of discussion but that's the main thing that I remember.

TRIAL EXAMINER: Was there anything said about compensation? How much you would make?

THE WITNESS: Well—

TRIAL EXAMINER: What was said? What do you recall, I mean?

THE WITNESS: That we would make 30 cents a case. [197]

TRIAL EXAMINER: I mean, compared to what you were making as a driver-salesman.

THE WITNESS: Considerably more. We had a chance to make considerably more as our own individual distributors.

TRIAL EXAMINER: It was so stated?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: By whom?

THE WITNESS: Gene Schilling.

TRIAL EXAMINER: Go ahead, Mr. Barton.

Q. (By Mr. Barton) After this meeting, were you at any time offered a distributorship, Mr. Willeford?

A. As soon as the meeting was over, a bunch of us walked up to Mr. Schilling and made appointments to talk to him about distributorships and told him we were interested in them and subsequent appointments were set up.

TRIAL EXAMINER: One by one, individually?

THE WITNESS: Yes.

Q. (By Mr. Barton) Did you have an appointment?

A. Yes, sir, I did.

Q. How long after the meeting was this appointment?

A. As close as I can recall it might have been two or three days later, or possibly a week later.

Q. And where was this meeting held?

A. In Gene Schilling's office at the Pepsi-Cola Company.

Q. Who was present? [198]

A. Gene Schilling and I.

Q. What was said in that meeting?

A. He went over the route that I would have, the area it would cover, how much commission I would

make off each case or how much I would make off each case. Basically that's what we went over. The contract, the reading of the contract—I had to read the contract completely through.

Q. Was the written contract there?

A. Yes, sir, it was.

Q. Was the contract signed on that occasion?

A. Yes, it was.

Q. Now, to what extent, if any, did the route which you had as a distributor change from that which you had as a driver-salesman?

A. A few stops were added in order to build the route up so the sales would be adequate for compensation for a distributor.

Q. Approximately how many stops were added?

A. To the best of my knowledge, there was three or four stops added to the route that I had at the time.

Q. And how many stops did you have altogether?

A. Approximately 30 or 35 stops.

MR. JACKSON: That is before or after?

Q. (By Mr. Barton) Before or after?

TRIAL EXAMINER: Before or after you became a distributor?

THE WITNESS: Before I became a distributor I had 30 or [199] 35 stops.

Q. (By Mr. Barton) To which two or three were added?

A. Two or three volume stops were added.

MR. JACKSON: The testimony was three or four.

TRIAL EXAMINER: Volume stops—that is different from other stops?

THE WITNESS: Yes, sir, it is.

TRIAL EXAMINER: Bigger sales?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: More sales?

THE WITNESS: Yes, sir.

Q. (By Mr. Barton) Do you have knowledge as to which driver-salesman had the [route]* that you had as a driver-salesman before you had it?

A. Yes sir, I do.

Q. Who was that?

A. Ken Baker.

Q. Now, at the time that you took over this route, did you have any discussions with Mr. Gene Schilling regarding your capabilities in handling that route?

A. Yes, sir, I did.

Q. When was that to the best of your recollection?

A. The best of my knowledge, it was two or three weeks—it might have been more—after Ken Baker was fired.

Q. And where was this discussion? [200]

A. At the Pepsi-Cola Bottling Company.

Q. What location?

A. 1100 "Q" Street.

Q. What location in the plant?

A. Mr. Schilling's office, to the best of my knowledge. It could have been in the sales room.

Q. Was anybody else present that you recall?

A. No.

Q. What was said on that occasion?

A. He asked me if I thought I could handle a route because it was a much larger route than the one I had been accustomed to. The route I had had small stops on it for the same company.

TRIAL EXAMINER: You changed routes after Baker was fired?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Go ahead.

THE WITNESS: I had a small route. It was a downtown route and it was a small volume route and I wanted a bigger volume route. And Gene asked me if I thought I could handle it because it was a bigger route and he also told me if he did agree on giving me this route, I would have to do a lot of hustling because Ken, he did a good job on his route, on the route when he was on it. I would have to do some hustling to keep up with what he did.

Q. (By Mr. Barton) Do you recall anything further of that [201] conversation?

A. No, I just agreed to that, that I would take the route.

Q. Now, Mr. Willeford, will you—were you present on the occasion in '63 when the men left the plant?

A. Yes, sir, I was.

Q. Were you one of the ones that left?

A. Yes, sir.

Q. Do you recall whether or not Mr. E. J. Crofoot, Sr. was present at any time during that day?

A. He was. He wasn't there when we walked out.

Q. When was he there?

A. After we walked out, he arrived.

Q. Did you see him arrive?

A. Yes, sir, I did.

Q. Where did you see him?

A. We was out in front of the Pepsi-Cola Bottling Company when he arrived.

Q. Did you see him go through the door?

A. Yes, sir, I did.

MR. BARTON: I have no further questions. [202]

* * *

TRIAL EXAMINER: I believe you stated that Mr. Baker's [205] route was much larger than the one you had been on prior to that time.

THE WITNESS: Yes, sir, it was.

Q. (By Mr. Jackson) As a matter of fact, Baker's route was one of the larger there at the plant at that time, was it not, or one of the larger ones, let's say?

A. Yes, sir.

Q. Mr. Willeford, on the route that you had run prior to the time you switched over to Mr. Baker's route, did you earn commissions?

A. Yes, sir.

Q. And as compared with that, did you experience an extra—an increase in commissions after you took over Mr. Baker's route?

A. Yes, sir.

Q. On the larger route?

A. Yes, sir. [206]

* * *

Whereupon,

DONALD MRAULE

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Barton) Would you spell your full name for the record, please.

A. Donald J. Mraule, M-r-a-u-l-e.

Q. What is your present address, Mr. Mraule?

A. 3606 Rong Way.

Q. Is that Sacramento?

A. Yes.

Q. What is your present occupation?

A. I am a driver with the John Bruner Company.

Q. Have you ever worked for Pepsi-Cola Bottling Company in Sacramento?

A. Yes, sir, I did.

Q. When to when?

A. From March 1962 into November of 1964.

Q. And in what position were you employed during that period?

A. Driver-salesman.

Q. For that whole period?

A. Yes, sir.

Q. And what was the reason for your leaving Pepsi-Cola? [207]

A. I was fired from there, and primarily through labor reasons. But the reason was given for my termination—they said it basically was attitude and because of failure to serve customers.

Q. Before your termination do you recall being present at a meeting at which it was announced that the Company was going to convert some routes to distributorships?

A. Yes, I was.

Q. And how long before your termination was that?

A. Approximately a month or month and a half before my termination. The meeting was mainly—it was held in October; sometime in October; I was terminated in November.

Q. Where was this meeting?

A. At one of the meeting rooms at the Pepsi-Cola Bottling Company.

Q. Do you recall who was present?

A. Yes, I do.

Q. Mr. Schilling was heading the meeting, was he not?

A. Yes. Well, the supervisors, Mr. Miller, Mr. Graff and Mr. Virg Conner and the driver-salesmen, plus Dwight Smith.

Q. Will you tell us, please, what was said on that occasion?

A. The meeting was pertaining to setting up distributorships, stating that majorities of the routes would be going on a distributorship basis.

Q. Who was speaking? [208]

A. Mr. Schilling was.

And that there would be a small number of routes retained as Company-operated, possibly three routes. During the course of the meeting it was stated that there would be a case payoff at 30 cents a case and that all of the routes would be more or less equalized, the ones that were on distributorships, so they would have about equal earning power. It was also brought up in the meeting about the expenses involved, such as truck expenses.

At the time they had a [pilot]* route going on this distributorship and these figures were brought forth from this pilot route and Mr. Thorne happened to be the driver-salesman on this pilot route and he eventually, he set up his route, cases, volume stops for taking off two of the routes that I know of and adding two to Mr. Thorne's route in order to build his route up so that the figures would come out showing good volume.

Also, Mr. Schilling stated at this meeting that the salesmen would be called in at a later date, they could make appointments to see him if they would want to have their routes as distributors.

Q. Do you recall anything further that was said?

A. No, I don't believe so.

Q. Did he mention anything about what would happen to a man who did not prefer to take his route as a distributorship? [209]

A. He said he would remain on with the Company and would be given a route as a Company driver rather than owning his own distributorship, but there would be someone who might want to take his route as a distributorship and the man in his present capacity would still stay in the Pepsi-Cola employment.

Q. Do you recall anything further?

A. No, that was about all I recall.

Q. After that meeting were you ever offered a distributorship?

A. Yes, I was.

Q. How long?

A. About, oh, a week or two later.

Q. And where did this happen?

A. In one of the back offices. I don't recall. It was in Mr. Schilling's office.

Q. And who was present?

A. Mr. Schilling and myself.

Q. And what was said on that occasion?

A. He stated that my route was going to be open for distributorship. He asked me if I would be willing to take the route, went over the totals of the route as to the operation of the distributorship, how it would work out, what my expenses would be pertaining to truck expenses, business license, accounting fees; if I had my own account for the route.

Q. What was your response? [210]

A. I rejected his offer.

Q. Can you remember anything else that was said at that meeting?

A. No. He let me go. He said that the route quite possibly would still be open for distributorship.

Q. [Did you tell him]* why you didn't want the distributorship?

A. Yes, I can. I told him if I was to take the route and pay my own business license and everything I would sort of like to run the route as I saw fit, still holding to Company policy on the route, and in the meantime—before my route was open for distributorship, I had had certain cuts in my route. I was given a new area which I didn't feel was a very good area for a distributorship, a lot of so-called "Mom and Pop" stores, in that area. And the good portion of my route was taken from me and given to Mr. Thorne.

TRIAL EXAMINER: Before this conversation?

THE WITNESS: Yes.

TRIAL EXAMINER: By Mr. Schilling?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did he suggest that you be given other accounts? Volume accounts?

THE WITNESS: During the course of the first meeting we had, he said that all routes would be set up on an equal basis.

TRIAL EXAMINER: I mean in the meeting with you personally.

THE WITNESS: My personal meeting? [211]

TRIAL EXAMINER: Yes.

THE WITNESS: He said possibly my route would be added to, yes, but I just didn't feel that I wanted to take the route that I had had with the latest changes I had in it with all the Mom and Pop stores and that I would rather have my original route back, the portion that was taken from me and given to Mr. Thorne.

TRIAL EXAMINER: Go ahead.

MR. BARTON: I have no further questions.

MR. JACKSON: May I be excused for just one moment?

TRIAL EXAMINER: How long after this conversation were you terminated?

THE WITNESS: And again, it was approximately two weeks after this conversation. Approximately a week to two weeks later. [212]

* * *

TRIAL EXAMINER: At the meeting where Mr. Schilling explained to all of you about the new plan for distributors, or at the meeting that you had with him personally about being a distributor, was there any discussion by him concerning what net earnings as a distributor would be in comparison with what you were paid as a driver?

THE WITNESS: The figure, as far as I can recall, wasn't derived at.

Q. (By Trial Examiner) I am not asking for a figure.

A. He said it would be a considerable increase.

Q. As a distributor?

A. Yes, over being just a driver-salesman with the Company.

Q. And, of course, you knew what you were making as a driver-salesman?

A. Yes.

Q. Approximately what was that?

A. I believe right around $65 to $6800.

Q. A year?

A. Yearly. [220]

* * *

MYRL MCHANN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Barton) Would you spell your name for the record, please, Mr. McHann?

A. Myrl McHann, M-c-H-a-n-n.

Q. How do you spell your first name?
A. M-y-r-e-l.
Q. What is your present address?
A. Home address, 6924 Wild Rose Way, Sacramento.
Q. What is your present occupation?
A. Distributor for Coca-Cola Bottling Company of Sacramento.
Q. Have you ever been employed by Pepsi-Cola Bottling Company of Sacramento?
A. Yes, I was.
Q. When did you start?

MR. JACKSON: Could you keep your voice up, Mr. McHann, [221] we have a little trouble hearing.

THE WITNESS: I was employed as a route salesman from November or October—or November of '64 to—

Q. (By Mr. Barton) And as a driver-salesman?
A. As a route salesman, yes.

TRIAL EXAMINER: For the first time?

THE WITNESS: At the employment time, yes.

TRIAL EXAMINER: No, I mean was that your first employment with Golden State?

THE WITNESS: Yes.

Q. (By Mr. Barton; I am not talking about when you became a distributor.
A. No, that was when I was first employed that I was employed as a route salesman.

TRIAL EXAMINER: Were you a salesman for some time before you—

THE WITNESS: Not for Golden State, no.

TRIAL EXAMINER: Before they put in the distributorship?

THE WITNESS: I was a salesman for Golden State Bottling Company as a route salesman, then concurrently I became a distributor.

TRIAL EXAMINER: At the same time?

THE WITNESS: No, sir, at a later date.

Q. (By Mr. Barton) How long after you started as a driver-salesman did you become a distributor? [222]

A. I became a distributor in January of 1965, so it would be a year or a little over.

Q. So you started as a distributor in January of '65 and you started as a driver-salesman a little over a year before that?

A. Yes.

Q. And when did you cease being a distributor?

A. December of 1968.

Q. After you became a distributor, were you required to pay dues to the PCBC, Inc.?

A. Are you relating to the Company Association? Our Company Association?

Q. Yes.

A. As a distributor, no.

Q. Before becoming a distributor, Mr. McHann, do you recall being present at a meeting at which the Company's decision to rate the distributorship was—

A. Yes, I do.

Q. About how long before you actually became a distributor, was this meeting which was announced?

A. I didn't become a distributor until the following January of '65 and to my recollection the meeting was held about the second [week]*—I think the second or third week of October, 1964.

Q. Where was this meeting? [223]

A. It was held in our general sales meeting room.

Q. And who was present?

A. All personnel involved in sales, supervisory, up to general manager.

Q. Tell us what was said on that occasion and by whom?

A. Mr. Gene Schilling was in charge of the meeting and he came and told us in regard to going into a distributorship that they had piloted Don Thorne as a distributor, as a self-employed distributor and that eventually all routes that were available or feasible to operate as a distributorship would become self-employed distributors, and the Company would retain those routes themselves which could not feasibly operated as such. And he did, Mr. Schilling mentioned that if we were interested that we could contact him and make an appointment to see him regarding the distributorship of each person and at that time, some did so and as following days went by, other people asked to see him in regard to the distributorship thing.

Q. Do you recall anything further that was said at the meeting?

A. Well, he said not to get panicky, that we wouldn't lose our jobs because of this distributorship thing, that we would still be in the employment of Pepsi-Cola.

Q. Do you recall anything further?

A. No, sir. [224]

Q. Do you recall him mentioning who had first chance at any route which was converted?

A. The way he told us, it was assumed the person that was on the route that became a distributor would have the first opportunity to take it as a distributor.

Q. Did he say that?

A. Not in those direct words, but that was the assumption.

Q. Did he say that in that regard?

A. Well, in—once my route was to become a distributor that I would have an opportunity to take it as a distributor.

Q. Did he say that at that meeting?

A. Not to myself, no.

Q. What did he say?

A. Mr. Schilling said that the routes as they were derived at, or broken into, as a distributor, the gentleman that had the route at that time would have the first opportunity to become a distributor on that certain route, and if the gentleman didn't want it, well, he wouldn't have to take it and he could become a route salesman or stay a route salesman with the Company.

Q. Do you recall anything further that was said on that occasion?

A. Not, other than just having the meeting with Mr. Schilling about it, if you were interested.

Q. Did you subsequently meet with Mr. Schilling? [225]

A. Yes, I did.

Q. How long after that meeting was that?

A. The first time I talked to Mr. Schilling about it was about the end of November, I believe.

Q. Where was this meeting?

A. Mr. Schilling's office.

Q. And what was said on that occasion?

A. I approached Mr. Schilling in regard to becoming a self-employed distributor on a route—not pertaining to the one I had at the time—and it was to my knowledge that the gentleman who had the route at that time was going to terminate his employment with Pepsi-Cola and that I asked for this gentleman's area as a distributor.

At that time Mr. Schilling said there was no reason why I shouldn't have it as a distributorship.

Q. Which gentleman's route was it that you are referring to?

A. Prior to me taking over the route as a route salesman, I took it over from Vic Helmer.

MR. JACKSON: I'm sorry, I didn't get the name.

THE WITNESS: Vic Helmer.

Q. (By Mr. Barton) What route did you have before starting as a salesman?

A. A city route as a salesman.

Q. Was that a high or low volume route?

A. It was considered one of the lower volume routes.

[226] * * *

(Examination by Barton)

Whereupon,

KENNETH BAKER

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Baker) Will you spell your name for the record, please, Mr. Baker.

A. B-a-k-e-r. Kenneth L. Baker.

Q. And your address?

A. 6633 Dobson Way, Sacramento.

Q. Are you the same Kenneth Baker who was terminated from Pepsi-Cola Bottling Company August 16, 1963?

A. Yes, sir.

Q. Have you been in the hearing during this proceeding?

A. Yes, sir.

Q. If you had not been terminated by Pepsi-Cola and a distributorship opportunity had been offered to you, would you have accepted it or rejected it?

A. Accepted it.

Q. Following your termination by Pepsi-Cola, were you able to secure employment?

A. After a certain lapse of time, yes.

Q. With whom?
A. Zellerbach Paper Company. [231]
Q. How long were you unemployed?
A. About two weeks.
Q. During that time, did you seek employment with other employers?
A. Yes, sir.
Q. How many did you contact at that period?
A. About 12 or 14 employers, if not more.
Q. How did you contact them?
A. Personally.
Q. What means of transportation?
A. My car.
Q. What's your best degree of estimation of the miles you traveled in making these contacts?
A. About 250 miles.
Q. Are you presently employed at Zellerbach?
A. Yes, I am.
Q. During your period of employment at Zellerbach, how have you gotten to work?
A. My own vehicle, sir.
Q. How did you get to work at Pepsi-Cola.
A. My own vehicle.
Q. Is the distance to Zellerbach greater than, equal to, or less than the distance to Pepsi-Cola?
A. Greater.
Q. What is your best estimate of how much greater that is? [232]
A. In a round trip estimate, 4.8 miles.
Q. How did you derive at that estimate?
A. I checked it with my speedometer.
MR. JACKSON: What was that difference?
MR. BARTON: 4.8.

Q. (By Mr. Barton) Is that your speedometer in your car?

A. Yes.

Q. Now, during your period of time, employment at Zellerbach, have you been required to become a member of any unions?

A. Yes, sir, I was forced to join the Teamsters' Union.

MR. BARTON: I am now marking for identification, General Counsel's 23 for identification, a document which purports to be a letter addressed to Kenneth L. Baker, signed by Carl J. Olson.

(The document above referred to was marked General Counsel's No. 23 for identification.)

Q. (By Mr. Barton) I show you G.C. 23 for identification and ask if you have ever seen that document before.

A. Yes, sir.

TRIAL EXAMINER: Did you give me the date?

MR. BARTON: No, sir; February 27, 1964.

Q. (By Mr. Barton) Did you receive that in the mail?

A. Yes, sir.

Q. And I note that that letter indicates that you were to tender Local 150 of the Teamsters' the sum of $85 in excess [233] of a sum of $1850 already tendered. Did you tender the $85?

A. Yes, sir.

Q. [How?]*

A. Check.

Q. Had you previously paid the $1650 as recited in that letter?

A. Yes, sir.

Q. How?

A. By check, too.

MR. JACKSON: May we have a continuing objection to relevancy on this and the mileage, too?

MR. BARTON: It is his expense.

TRIAL EXAMINER: If you wish a continuing objection, yes.

MR. JACKSON: We don't believe these are proper items.

MR. BARTON: Very well.

Q. (By Mr. Barton) Now, after receiving this letter, did you tender monthly dues, payments to Local 150?

A. Yes, sir.

Q. In what amount?

A. $6.50.

Q. Monthly?

A. Yes, sir.

Q. Was that the amount of dues you paid throughout the period of your employment, to the present time?

A. No, sir. In October of 1966 the dues went up to $7.50. [234]

MR. BARTON: I would offer G.C. 23 at this time.

TRIAL EXAMINER: Objection?

MR. JACKSON: No.

TRIAL EXAMINER: It may be received.

(The document above referred to, heretofore marked G.C. 23 for identification, was received at evidence.)

MR. JACKSON: Except the general objection we have already indicated.

MR. BARTON: Nothing further.

Let me put one more question to him.

Q. (By Mr. Barton) How many days a week are you required to work?

A. Five days.

Q. And has that been true throughout the tenure of your employment?

A. Yes, sir.

Q. How many days a week were you required to work at Pepsi-Cola?

A. Five days.

Q. Was that true at the time of your termination?

A. Yes, sir.

MR. BARTON: That's all.

TRIAL EXAMINER: In Appendix A—D—it shows—did you change Appendix D? I see the original. [235]

MR. BARTON: No, sir.

TRIAL EXAMINER: Okay.

MR. BARTON: I am aware insofar as . . . I believe it's the fourth quarter of '63.

TRIAL EXAMINER: That's the very thing I was going to ask you.

MR. BARTON: Inasmuch as our totals indicate no backpay owing for that time, we don't desire—we don't need to put in any evidence of expenses.

TRIAL EXAMINER: The interim earnings exceeded—

MR. BARTON: Yes.

TRIAL EXAMINER:—exceeded what he would have—oh, okay. That answers my question.

CROSS-EXAMINATION

Q. (By Mr. Jackson) Mr. Baker, when you went to work for Zellerbach you were paid for your employment there?

A. Yes, sir.

Q. What was the nature of your position when you first went to work for them?

A. I was a delivery man.

Q. And you say you went to work for them approximately two weeks after you left Pepsi-Cola?
A. Yes, sir.
Q. You have been employed there continuously since?
A. Yes, sir. [236]
Q. There has been no break as far as going to work for some other—
A. I did have one break that I was laid off from Zellerbach but I did get hired back by them and have worked there since then.
Q. Except for one layoff you have worked continuously since the time you first went to work for them?
A. Excluding the strikes, sir or something like sickness.
Q. When were you laid off?
A. The day before Thanksgiving in 1963.
Q. Approximately when was that? How long was that?
A. That was four . . . counting Saturday and Sunday, that was four, five days.
Q. A five-day layoff?
A. I was laid off there indefinitely then, but I mean there was a lapse before I found another job with another company.
Q. You were laid off the day before Thanksgiving and then you went to work again the following Tuesday, right?
A. Monday.
Q. So you only really missed one workday, correct?
A. Actually I didn't get paid because I got laid off the day before Thanksgiving and Zellerbach didn't pay me for Thanksgiving.
Q. Where did you go to work then on the following workday, Monday? [237]

Withdraw that.

It was the day before Thanksgiving, 1963, that you were laid off?

A. Yes.

Q. Where was it then, that you started to work the following Monday?

A. LaVetti Wine.

Q. What was the nature of your employment there?

A. Delivery man.

Q. Was that pretty much the same type of job you had at Zellerbach?

A. Yes. Delivering wine to grocery stores.

Q. How long did you work for LaVetti Brothers?

A. One week.

Q. Then did you go directly back to Zellerbach?

A. Yes, sir.

Q. Then you have been employed there continuously?

A. Yes, sir.

Q. What was the rate of pay you were earning when you were first hired by Zellerbach?

A. I don't recall exactly—I started out I think first at kind of a partial pay, not the full pay scale. Then it went up to a 118 or something like that a week.

Q. 118 per week?

A. Something like that. [238]

Q. On what basis were you paid?

A. By the hour.

Q. And that averaged about $118 per week?

A. Yes, sir.

Q. Was that your takehome pay or gross pay?

A. We do have overtime, too, but I don't recall.

That was the gross, actually, before takehome, what I just mentioned.

Q. With or without overtime?

A. Without.

Q. And did you work on the average of some overtime every week?

A. I couldn't say. It's been a long time ago.

Q. Were you paid at that same rate and on that same basis when you were laid off that November at Thanksgiving?

A. Yes, sir.

Q. When you were rehired at Zellerbach, was it at the same rate or at the same base again?

A. I think so.

Q. Do I understand you did not have a permanent assignment at the time you were first hired?

A. No, sir. I wasn't permanently an employee.

Q. In December you returned?

A. Around the first of December.

Q. The early part of December, you returned to work permanently [239] for them?

A. Yes.

Q. When you returned to work at that time following the layoff did you go back to work as a permanent employee?

A. For Zellerbach, yes, sir.

Q. No change in pay or basis of your pay?

A. Right.

Q. During the time you worked for LaVetti Brothers, that one week, what were you paid for that?

A. I don't recall. Must be just around in that same area.

Q. Did you have some income from Teamsters Local 150 during that period?

A. Possibly. I was picketing. Distributing leaflets and so forth for them.

Q. Were you paid for that?

A. Yes, sir.

Q. How much were you paid.
A. I think it was $2.00 an hour.
Q. Do you recall how much you earned altogether?
A. I couldn't tell you that.
Q. Over a hundred?
A. That I couldn't tell you, sir.
Q. Is your position with Zellerbach at the present time the same as it was when you went back after the layoff?
A. Yes, sir. [240]
Q. Same general position?
A. Yes, sir.
Q. Has your compensation been changed or increased since then?
A. Yes. My pay has raised as contracts have come up and we have—the Teamsters negotiated and they put in a contract. Ever so often our pay, we have raises, yes, sir.
Q. Do you recall when the first raise was?
A. No, sir. There's one every six months to a year.
Q. And are you still employed on an hourly basis?
A. Yes, I am.
Q. The following decision in your case here by the Court of Appeals, did you confer with Mr. Dempster at the Labor Board regarding the amount of your earnings during this interval?
A. I did.
Q. What did you furnish him in regard to evidence as to what you had earned during this period?
A. A form to fill out that I did and I would mail back to Mr. Dempster for my expenses and wages, union dues, so forth.
Q. Did you or he communicate with them, to ascertain from your employers' records what you had been paid during this interval?

A. I checked—I went to Zellerbach and asked for a certain document of my wages.

MR. BARTON: It might help, your Honor, I would offer [241] the stipulation that our staff checked not only with the employers but the Social Security Administration to verify these figures.

TRIAL EXAMINER: All right.

MR. BARTON: I don't know if that answers the question or not.

Q. (By Mr. Jackson) You did obtain some pay records from your employer?

A. Yes, sir.

Q. Did you turn those over to Mr. Dempster?

A. Yes, sir.

Q. Did he make some computation to indicate the totals of your earnings?

A. Possibly. I don't recall.

Q. Did you review with him the results of the computations?

A. Possibly. I know over the phone there have been a few discussions between Mr. Dempster and myself, but I couldn't recall now.

Q. I will show you a document that has been attached to the supplemental pay specifications in your case here, entitled "Appendix D" and subtitled "Baker's Net Interim Earnings," rounded to the closest dollar amount and will ask you to go over that for the period indicated.

So far as you can tell are those figures you gave to Mr. Dempster, the figures regarding your own earnings? [242]

A. I couldn't say. The figures aren't fresh in my mind what I have given him over the last several years.

Q. Have you seen Appendix D before?

A. Yes, sir.

Q. Before, was it correct?
A. That I don't know.
Q. So far as you are right, I asked you to look at these figures.
A. So far as I'm aware these are the proper figures.
Q. Are you aware and I will ask you in that case, to look it over rather carefully and tell me if it does not correctly reflect what it purports to reflect, namely, your earnings and claimed expenses during this interval?
A. No, sir.
Q. The entire Appendix D?
A. Yes, except for the stipulations—changes—that 200.
Q. That one typographical error?
A. Yes.
Q. A proper reflection of what it purports to reflect?
A. Yes, sir.
Q. Mr. Baker, this [Appendix]* D—it ends with the one quarter of 1969. Has your pay changed at any time since June of '69?
A. I don't recall.
Q. What's your takehome pay at the moment?
A. It varies, with the overtime. With the busy season or [243] the slack season—various things enter into that.
Q. When is the busy season?
A. Just before Christmas.
Q. September, for the busy season, what does your pay average per week, including overtime?
A. I couldn't put a specific figure on it.
Q. About?
A. Anywhere from $160 a week to $200 a week. In a variance in there.

TRIAL EXAMINER: This is takehome?

THE WITNESS: No, gross pay.

Q. (By Mr. Jackson) It varies from 160 to 200? What occasion the variance overtime?

A. Yes, sir.

Q. This is not through the busy season?

A. No, sir.

TRIAL EXAMINER: What is your base pay currently?

THE WITNESS: I think is $160 a week. We're paid every two weeks, $321.

Q. (By Mr. Jackson) What is the range during the busy season?

A. Say between $180 to $220.

Q. Do you have any other sources of income in your own work?

A. Not at the present time.

Q. Have you in the past? [244]

A. Yes, sir.

Q. What?

A. Pacific Maritime Association, which is the Port of Sacramento. I worked there when we were on strike in 1967, the second quarter of 1967. In the second quarter of '67 I went to the PMA approximately two times a day, seven days a week. They work Saturdays.

Q. Did you stay all the way through?

A. No, sir, we were on strike in 1964, the third quarter of '64—July—the truckdrivers—we went out on strike.

Q. Did you work during that time?

A. I pulled picket duty at Zellerbach every day but then it was only four hours and then after that, I'd go out and seek work elsewhere, other trucking outfits, lumping jobs and all.

Q. Those are the ones that are indicated in Schedule B?

Interstate Motor Lines, Southern California Freight, Arrow Trucking, and so forth?

A. Yes, sir.

Q. Again referring to the period when you mentioned, '67, . . . yes.

A. The second quarter.

Q. Is that figure reflected in Schedule D for that period?

A. Yes, sir.

Q. Were there any other time periods?

A. No, sir. [245]

Q. In 1965, the first quarter, you had some earnings from Southern California Freight Lines.

A. Yes, sir. After hours from Zellerbach.

Q. Moonlighting, kind of?

A. Yes, sir

Q. That is reflected in the Schedule B that we're speaking of?

A. Yes, sir.

MR. JACKSON: I think that's all. Thank you, Mr. Baker.

TRIAL EXAMINER: Wait a minute.

Any redirect?

MR. BARTON: Yes, sir.

REDIRECT EXAMINATION

Q. (By Mr. Barton) During the period of the quarter of '64 when you were on strike and working for other employers, what location were you working for Interstate Motor Lines?

A. At their plant on 55 First Avenue.

Q. How many days?

A. I don't recall.

Q. How far is that location from your residence?
A. Probably . . . approximately five miles round trip.
Q. Did you drive?
A. Yes, sir.
Q. When you worked for Southern California Freight Lines, Owen C.—ONC Fast Freight—where did you work then?
A. That was also in the south area. On 52nd Avenue. [246]
Q. How many days were you there?
A. For them, . . .
I don't recall. Maybe one, two days.
Q. How far away was that?
A. Approximately five miles round trip.
Q. Arrow Trucking—where did you work for them?
A. That was lumping jobs. That was out from my house to Burke-McDowell Warehouse. About eight miles round trip.
Q. DiSalva?
A. That was lumping jobs, too. They were over there at the Rice Growers' Association in West Sacramento unloading rice.
Q. How far was that?
A. About 16 miles round trip from my house.
Q. PMA—do you recall approximately how many days you worked there?
A. No, sir.
Q. More than one?
A. Yes.
Q. How far did you have to travel then?
A. I would say, at least 18 to 20 miles round trip from my house.
TRIAL EXAMINER: Is that a longshore job?

THE WITNESS: Yes.

TRIAL EXAMINER: Were they shape-up there? [247]

THE WITNESS: I don't know what the term means.

TRIAL EXAMINER: Sort of gone out of style, I think.

MR. JACKSON: It's in style in Brooklyn.

Q. (By Mr. Barton) How many days did you go there, seeking work?

A. Every day that I recall.

MR. BARTON: Nothing further.

MR. JACKSON: No further questions

TRIAL EXAMINER: That's all, Mr. Baker. You're excused. [248]

* * *

Whereupon,

EUGENE SCHILLING

was recalled as a witness by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

Q. (By Mr. Jackson) Mr. Schilling, I hand you a document entitled "Distributorship Agreement." It bears the date 10-December-1964 on the cover page. It is a 13-page document bearing your signature on the 13th page, or what purports to be your signature, and that of Mr. McHann. I ask you if you can identify that for me.

A. That's the distributor agreement that we have with the independent distributors of Pepsi-Cola Bottling Company.

Q. Is this the one that was executed with Mr. McHann in December of 1964?

A. Yes, sir.

Q. Is this the same form contract that is executed with all this—these distributors?

A. Yes, sir.

Q. Or has that form undergone any change since that time?

A. No, sir.

Q. It is the form that is currently in effect?

A. Correct. [251]

* * *

MR. JACKSON: At this point, Mr. Examiner, if I may interrupt the testimony of Mr. Schilling, the counsel for General Counsel and myself have agreed that the following would be testified to by Mr. Schilling, Sr., by Mr. Gene Schilling and by his son, Mr. William Schilling, if they were examined on this subject: It pertains to certain attributes for the distributors' arrangement with the Pepsi-Cola and is offered to show that these distributors are independent contractors.

MR. BARTON: Before Mr. Jackson begins, I want to make it clear that as much as this is not a statement completely reduced to writing at the present time, my agreement is contingent to the statement as resubmitted on the record by Mr. Jackson.

TRIAL EXAMINER: All right.

MR. JACKSON: That, of course, goes without saying.

If called or examined on the subject, both Mr. Gene Schilling and Mr. William Schilling would testify that the distributors are required to provide their own trucks and to bear the cost or responsibility for and the cost of all [252] maintenance, insurance, licenses and so forth in connection with the truck and that, in fact,

they lease them from Hertz and are required to bear all the expenses in connection with their trucks and other equipment, as needed. If they do not share in any of the compensation or fringe benefits that employees of Pepsi-Cola do,—they don't have vacations or holidays or other fringe benefits—that there is no payroll withholding, and their compensation is derived from the difference between the price at which they purchase products from Pepsi-Cola and the price for which they sell the same product. And that their sole compensation—the independent distributors bear the loss of any theft or major breakage that occurs, that they are entitled to extend credit—it's up to them whether they extend credit to their customers—and they also bear the risk of any credit loss on this extent on credit they have extended themselves.

Their hours of work they are free to set, free to determine themselves, both as to frequency and regularity. Also, within their territory the frequency with which they call upon their customers and the orders with which their customers are called upon is a matter for their determination. They are required to furnish and pay for any and all additional labor or assistance which may be needed in running their routes. That is to say, in this respect: If they are sick or on vacation or if they need additional help in the servicing [253] of the routes. In other words, it is their obligation to see that the route is serviced properly and to supply whatever help is necessary and pay for whatever labor and help is needed to that end.

It is their determination, the distributors' determination as to what quantities are required. It is also within their province, if they wish to deal in non-competing products, they are permitted by their con-

tract to engage in other business, so long as they do not sell products which compete with Pepsi-Cola.

They are free to warehouse their products wherever they choose; they are also responsible for and obligated to keep their own accounting records and to handle their own finances, to retain and pay for their own [accountants]* and to the extent they are needed.

They, of course, arrange for filing papers—for payments of their own income tax returns.

They may not be terminated except in accordance with the provisions of the contract executed between them and Pepsi Cola.

That is the end of the statement.

MR. BARTON: I would be willing to stipulate that Mr. Schilling would so testify. I would object to the relevancy of the testimony.

TRIAL EXAMINER: All right. Objection overruled and the [254] stipulation is accepted. [255]

* * *

(Witness—Schilling; Examination by Jackson)

What qualities were considered by you important in determining whether or not you offered a distributorship to a given person?

A. We based that on past performance, a man's ability to handle his route, his finances, whether he was willing to do the extra things that are necessary to develop a route, how he serviced his accounts, if he had any calls for lack of service, any complaints he had on his route.

What we were after were self-starters, men that we did not want to lose to other companies when they were our best employees.

Q. Were there certain qualities that you found were required for distributors that were not necessarily required of driver-salesmen?

A. In order to be a successful distributor, you had to be able to organize your own work; you had to work without supervision. We weren't in a position, nor did we feel it would have to be necessary to have continual supervision on independent distributors. They would have to have the ability to set up their own routes, organize their own time, take care of their own customers in the proper manner. [257]

* * *

(Witness—Schilling; Examination by Jackson)

Q. Incidentally, was that a practice prior to the sale to All American, you invoiced the distributors regularly for goods that were purchased by them?

A. That is correct.

Q. Mr. Schilling, at the time of the sale by Golden State, of the sale of Pepsi Cola to All American, do you recall whether or not the consent of the various distributors were contained in the assignment of their contents?

A. Yes, sir.

Q. Was that part of the purchasing agreement or part of the closing document?

A. That was part of it, yes, sir.

Q. I show you a document that has been marked R-4, Respondent's Exhibit 4, bearing the date February 19, 1968, and in handwriting, entitled, "To Whom it May Concern," and bearing the signature of various individuals and ask you if you can identify that for me.

A. This is the distributor's consent of the assignment from Golden State to All American Beverages.

Q. Which is part of the original closing document?
A. That is correct, sir. [274]

* * *

(Discussion off the record.)

TRIAL EXAMINER: On the record.

In an off-the-record discussion the parties stipulated that the prior corporation known as Sam Snead and others became All American.

MR. BARTON: That was solely a name change. [276]

* * *

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IN THE

Supreme Court of the United States

October Term, 1972
No. .....

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

Page

Opinions Below 2

Grounds for Jurisdiction in This Court 3

Constitutional Provisions and Statutes Involved 3

Questions Presented 4

Statement of the Case 6

(a) Basis for Federal Jurisdiction in First Instance 6

(b) Summary of Proceedings Below 7

(c) The Facts Upon Which This Case Arose .. 9

Summary of Argument for Allowance of the Writ .. 13

Argument for Allowance of Writ 15

I.

The Board's "Perma-Vinyl Doctrine" Contravenes the Established Authority of This Court and of Several Courts of Appeals and Therefore Creates a Conflict on Important Issues of Law Which Must and Can Only Be Resolved by This Court 15

A. The Application of the Perma-Vinyl Doctrine to Extend Golden State's Liability for Remedial Action Past the Cutoff Point of a Bona Fide Sale Conflicts Irreconcilably With Decisions of This Court and Principles of Due Process 20

B. The Application of Perma Vinyl to Fasten Unlimited Liability Upon All American, Both Retrospectively and Prospectively, Conflicts With Decisions of This Court and Those of Other Courts of Appeals and, Additionally, Constitutes a Denial of Due Process 23

Page

C. Perma Vinyl Is Inapplicable to Establish Liability Against All American in Any Event, Since the Essential Element of Knowledge Cannot, Consistent With Due Process, Be Established on This Record .. 30

II.

Does the Scope of the Remedial Order Affirmed and Enforced Below Exceed the Powers Granted to the Board by the Act? 33

A. Does the Board Have the Remedial Authority to Continue the Accrual of Liability for Reinstatement Beyond That Date When the Employee Would Have Voluntarily Terminated the Employment Relationship? 33

B. Has the Board Exceeded the Power Granted to It Under the Act by Ordering Petitioners to Establish the Discriminatee in an Independent Business? 35

C. Has the Board Exceeded the Power Granted to It Under the Act by Ordering the Petitioners to Pay, Ostensibly as "Back Pay," Consequential Damages Based on Alleged Loss of Anticipated Profits of a Business? 38

III.

Conclusion 40

INDEX TO APPENDICES

Appendix A. Trial Examiner's Supplemental Decision ..... App. p. 1

Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit 32

Appendix C. Judgment 37

Appendix D. Fifth Amendment to the United States Constitution 39

National Labor Relations Act, as Amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151 Et Seq.) 39

Federal Rules of Civil Procedure 65(d) 45

TABLE OF AUTHORITIES CITED

Cases	Page
Brown v. NLRB, 462 F.2d 699 (9th Cir. 1972)	37, 39
Handley v. Guasco, 165 Cal.App.2d 703, 322 P.2d 354 (1958)	40
Isis Plumbing and Heating Co., 138 NLRB No. 97, 51 LRRM 1122 (1962)	39
Kloberdanz v. Joy Mfg. Co., 288 F.Supp. 817 (D.C. Colo. 1968)	29
Liberty Electronics Corp., 143 NLRB No. 64, 53 LRRM 1370	19
M. Eskin & Son, 148 NLRB No. 107, 57 LRRM 1121 (1964)	17, 19, 26
Macmorris Sales Corporation v. Kozak, 263 Cal. App.2d 430, 69 Cal.Rptr. 719 (1968)	40
Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967)	4, 16, 19
Mastro Plastics Corp., 136 NLRB No. 119, 50 LRRM 1006	34, 35
NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2nd Cir. 1953)	37
NLRB v. Birdsall-Stockdale Motor Company, 208 F.2d 234 (10th Cir. 1953)	5, 16, 17, 19, 26
NLRB v. Burns International Security Service, ... U.S. ...., 32 L.ed.2d 61, ... S.Ct. .... (1972)	28, 29
NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939)	19
NLRB v. Golden State Bottling Company, Inc., 353 F.2d 667 (9th Cir. 1965)	9
NLRB v. Hermon Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963)	4, 5, 16, 19, 21, 27

Page

NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954) 5, 16, 17, 19, 27

NLRB v. New Madrid, 215 F.2d 908 (8th Cir. 1954) 4, 16, 19, 20, 21

Perma Vinyl Corp., 164 NLRB No. 119, 65 LRRM 1168 (1967) 14, 15, 16, 17, 18, 19, 21, 22, 24, 27, 29, 30, 32

Regal Knitwear v. NLRB, 324 U.S. 9, 89 L.ed. 661, 65 S.Ct. 478 (1945) 5, 16, 19, 24

Rochin v. California, 342 U.S. 165, 96 L.ed. 183, 72 S.Ct. 205 (1951) 23, 32

Schwartz v. McGraw Edison Co., 14 Cal.App.3d 767, 92 Gal.Rptr. 776 (1971) 29

Symms Grocer Co., 109 NLRB No. 58, 34 LRRM 1326 (1954) 17, 19, 26

Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 13 L.ed.2d 827, 85 S.Ct. 994 (1965) 4, 16, 19, 20

Tot v. U.S., 319 U.S. 463, 87 L.ed. 1519; 63 S.Ct. 1241 (1942) 32

United Auto Workers v. NLRB, 442 F.2d 1180 (9th Cir. 1971) 13, 18, 24, 27

United States Pipe and Foundry Company v. NLRB, 398 F.2d 544 (5th Cir. 1968) 13, 15, 17, 18, 24, 27

Wiley v. Livingston, 376 U.S. 543, 11 L.ed. 2d 898, 84 S.Ct. 909 (1964) 19, 27, 28, 29

Rules

Federal Rules of Civil Procedure, Rule 65(d) ..3, 24

Rules of the United States Supreme Court, Rule 19 .. 3

Statutes

	Page
Labor Management Relations Act, Sec. 1(b)	3
Labor Management Relations Act, Sec. 2(3)	3
Labor Management Relations Act, Sec. 7	3
Labor Management Relations Act, Sec. 8(a)(1)	3, 6
Labor Management Relations Act, Sec. 8(a)(3)	3, 6
Labor Management Relations Act, Sec. 10(b)	3
Labor Management Relations Act, Sec. 10(c)	3, 26, 36, 38, 39
Labor Management Relations Act, Sec. 10(e)	3, 6
Labor Management Relations Act, Sec. 10(f)	3, 6
United States Code Annotated, Title 28, Sec. 1254	3
United States Code Annotated, Title 29, Sec. 141-(b)	3
United States Code Annotated, Title 29, Sec. 152 (3)	3
United States Code Annotated, Title 29, Sec. 157	3
United States Code Annotated, Title 29, Sec. 158 (a) (1)	3
United States Code Annotated, Title 29, Sec. 158 (a) (3)	3
United States Code Annotated, Title 29, Sec. 160 (b)	3
United States Code Annotated, Title 29, Sec. 160 (c)	3
United States Code Annotated, Title 29, Sec. 160 (f)	3
United States Code, Title 29, Sec. 160(c)	38
United States Constitution, Fifth Amendment	3

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento (hereinafter sometimes referred to as "Golden State"), and All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento (hereinafter sometimes referred to as "All American"), Petitioners herein, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled cause on August 21, 1972.

Opinions Below.

This Petition results from a decision of the United States Court of Appeals for the Ninth Circuit affirming and enforcing without modification the Supplemental Decision and Order of the National Labor Relations Board (hereinafter referred to as the "Board") which upheld the decision of its Trial Examiner. These decisions, in chronological order, were as follows:

1. On June 13, 1970, the Trial Examiner, Robert L. Piper, executed and filed the Trial Examiner's Supplemental Decision which is incorporated into the decision of the Board. This decision, as incorporated, is reproduced herein as Appendix "A" to this Petition (the decision and recommended order of the Trial Examiner, together with the decision of the Board, shall hereafter be referred to cumulatively as the Board's "Supplemental Decision"). The Supplemental Decision has been reported in 187 NLRB No. 142, 76 LRRM 1868 (1971).

2. On January 21, 1971, the Board upheld the Trial Examiner *in toto* in its Supplemental Decision and Order (Appendix "A").

3. The "*Per Curiam*" decision of the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as the "Opinion"), Judge Kilkenny dissenting, affirmed and enforced *in toto* the decision of the Board. The Opinion is reported as .... F.2d .... (9th Cir. 1972), and is reproduced herein as Appendix "B" to this Petition. The proposed judgment enforcing this Opinion is reproduced herein as Appendix "C" to this Petition.

Grounds for Jurisdiction in This Court.

The Opinion below decides and applies several important questions of federal law contrary to decisions of this Court and several Courts of Appeals, as well as certain important federal questions of first impression, which until now have not been, but ought to be, decided by this Court. On this basis, petition is made to this Court pursuant to 28 U.S.C.A. Section 1254 and U.S. Sup. Ct. Rule 19, for certiorari to review the Opinion below.

The Opinion below was dated and entered on August 21, 1972; no order was sought or made respecting rehearing or respecting an extension of time within which to petition for Certiorari.

Pursuant to application, the United States Court of Appeals for the Ninth Circuit has granted a stay of mandate of its Order to November 9, 1972.

No order has been sought or granted for an extension of time in which to petition for Certiorari.

Constitutional Provisions and Statutes Involved.

The constitutional provision involved herein is the due process clause contained within the Fifth Amendment to the United States Constitution. The statutes involved in the cause are contained within the Labor Management Relations Act (hereinafter referred to as the "Act"), Sections 1(b); 2(3); 7; 8(a)(1), (3); 10(b), (c), (e), (f) as Amended, (29 U.S.C.A. Sections 141(b); 152 (3); 157; 158 (a) (1), (3); 160 (b); 160 (c); 160 (f)) as well as *Federal Rules of Civil Procedure* 65(d) (28 U.S.C.A.). The constitutional provision and the statutes cited, in pertinent part, are printed verbatim and are reproduced herein as Appendix "D" to this Petition.

Questions Presented.

In its deceptively simple opinion, the Court of Appeals plows large sections of new ground in the field of labor law. It fastens upon *both* parties to the bona fide purchase and sale of a business virtually unlimited joint and several liability, both prospectively and retrospectively, to remedy unfair labor practices by approving and actually applying, for the first time in its full sweep, the Board's so-called "*Perma Vinyl* doctrine." In so doing, the opinion raises the following questions:

1. If the owner of a business sells and transfers its entire ownership and interest in that business to a bona fide third party purchaser in a bona fide transaction:

(a) Can the liability of the seller to remedy past unfair labor practices be extended past the time of such sale and continued *ad infinitum* in spite of the fact that the seller is thereafter incapable of terminating this liability? (The Opinion's affirmative holding in this respect not only contravenes decisions of this Court[1] and of the Courts of Appeals for the Sixth and Eighth Circuits,[2] but is violative of due process as well.)

(b) Can the bona fide purchaser be held liable, jointly and severally, with the seller to remedy such unfair labor practice, not only

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[1]*Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 13 L.ed.2d 827, 85 S.Ct. 994 (1965).

[2]*NLRB v. New Madrid*, 215 F.2d 908 (8th Cir. 1954), *Makela Welding, Inc. v. NLRB*, 387 F.2d 40 (6th Cir. 1967); *NLRB v. Hermon Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963).

prospectively from the time of the sale and transfer, but retrospectively, for the entire period prior thereto, by virtue of the mere fact (assumed *arguendo*) that it takes with knowledge of such unfair labor practice? (Again, the Opinion's affirmative holding contradicts not only decisions of this Court[3] and decisions of the Courts of Appeals for the First, Sixth and Tenth Circuits.[4] but also is violative of due process as well.)

(c) Can such knowledge be "imputed" to such buyer, *ex post facto*, merely by virtue of its post sale retainer of supervisory personnel formerly employed by the seller?

(d) If knowledge cannot be established by such imputation, has the Board satisfied its burden of proving such knowledge merely by discrediting the adverse testimony of its own witnesses on the issue and by drawing adverse inferences from Petitioners' failure to call officers of the purchaser in order to corroborate the negative testimony of the seller on the point?

The Opinion further establishes several new and rather startling principles of application to the specifics of the familiar back pay and reinstatement remedies uni-

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[3]*Regal Knitwear v. NLRB*, 324 U.S. 9, 89 L.ed. 661, 65 S.Ct. 478 (1945).

[4]*NLRB v. Birdstall-Stockdale Motor Co.*, 208 F.2d 234 (10th Cir. 1953); *NLRB v. Lunder Shoe Corporation*, 211 F.2d 284 (1st Cir. 1954); *NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963).

formly ordered in wrongful discharge cases under the Act, thus giving rise to the following further questions:

2. If an employer is found to have discharged an employee wrongfully and discriminatorily in violation of Section 8(a)(3) of the Act:

(a) Can such employer be required to pay to such employee back pay beyond the time when, as found by the Board, such employee would, in any event, have voluntarily terminated his employment relationship with the company?

(b) In compliance with the customary order to "offer such employee reinstatement to his former or substantially equivalent position," can an employer be required to establish such former employee in an independent business?

(c) In compliance with the usual order to pay back pay to such employee/discriminatee, can the employer be required to pay, purportedly as "back pay," compensatory damages to such employee for loss of anticipated profits from an independent business which had yet to be established, particularly where such employee has no prior independent business experience?

Statement of the Case.

(a) Basis for Federal Jurisdiction in First Instance.

The action herein was brought before the Board on charges filed alleging that Golden State had violated the Act; more particularly, Sections 8(a) (1) and (3) thereof, as well as other sections of the Act not now in issue. The court below had jurisdiction by virtue of Sections 10(e) and 10(f) of the Act.

(b) Summary of Proceedings Below.

This matter, in Petitioners' view, is a fairly straightforward "back pay" case. Had the Board so considered it and applied the settled principles applicable to such cases, the matter would not now be before this Court. In its original Order, handed down on June 10, 1964, the Board held, *inter alia*, that one Kenneth L. Baker (hereinafter referred to as "Baker") had been discriminatorily discharged by Golden State on August 16, 1963, and ordered, among other things, that Golden State offer him reinstatement to his former position, or one substantially equivalent, and to make him whole for any loss of earnings. Review of this Order was sought in the United States Court of Appeals for the Ninth Circuit. Following certain delays explained below, the court rendered a decision in November of 1968 enforcing that portion of the Order relating to Baker, while denying enforcement as to other significant parts of the Board's original Order. This Order was not rendered until after Golden State's sale of its bottling and distribution business to All American in January of 1968.

Within the limits of its power to do so, Golden State was perfectly willing to comply with the portions of the Order relating to Baker as originally formulated. However, the Board's view of these requirements, when translated into application, differed radically, (Petitioners submit), from the Board's previous practice and settled law. As a consequence, the matter went to hearing in supplemental proceedings upon a back pay specification. These resulted in a recommended decision and Order by the Trial Examiner dated July 13, 1970 which was adopted *in toto* and without modifica-

tion by the Board on January 21, 1971 (the "Supplemental Decision").

In the Supplemental Decision, the Board required something quite different from that contemplated in the original Order enforced by the Court of Appeals:

Golden State *and* All American as well were not simply ordered to pay the back salary due to Baker, but were instead required to pay him the "profits" he would allegedly have realized from an independent business. Instead of being required to reinstate him to the "former position or substantially equivalent position" which he held prior to the discriminatory termination, Golden State *and* All Amercian were ordered to offer to set Baker up in a separate and independent business.

In addition to the foregoing, which is novel enough in itself, the Board also held the original employer (Golden State) liable to Baker for reinstatement as well as back pay accrual subsequent to the sale of the business and beyond the time when Golden State had any power (by the Board's express holding in this matter!) to offer or perform reinstatement as to Baker. Further, the Board imposed coextensive joint and several liability upon All American, a bona fide purchaser. Thus, All American was held liable and responsible for acts which it not only did not commit, but, which, Petitioners submit, it did not even know about.

The Supplemental Decision was brought before the United States Court of Appeals for the Ninth Circuit upon the Petitions of Golden State and All American for review, and upon the cross-petition of the Board for enforcement. On August 21, 1972 the court handed down its Opinion granting enforcement of the Supplemental Decision in entirety and without modification.

(c) The Facts Upon Which This Case Arose.

The facts upon which this Petition arises commenced on August 16, 1963 when Golden State allegedly wrongfully discharged Baker for union activity. On June 10, 1964 the Board rendered its original decision finding that Golden State had committed certain unfair labor practices. Pursuant thereto, it ordered Golden State to offer reinstatement to Baker to his former position or a substantially equivalent position and to make him whole for any loss of earnings resulting from Golden State's unfair labor practices in violation of Section 8(3) of the Act.

That decision was appealed to the United States Court of Appeals for the Ninth Circuit which, on December 2, 1965, handed down its first opinion herein enforcing, in part only, the Board's original Order.[5]

On January 4, 1966, the court denied the Board's petition for rehearing. However, on April 4, 1966, the court granted the Board's motion to reconsider this denial of rehearing. In November of 1968, over two and one-half years later, the court, upon such reconsideration, reaffirmed its original denial of rehearing. It was thus not until November 27, 1968 that the final decree in this matter was entered [R. 111-112].[6]

During the course of the aforementioned appeal the following three separate sequences of events occurred which dramatically affect the rights of Petitioners here-

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[5]*NLRB v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

[6]References to the record reproduced as "Volume I Pleadings" are designated "R." References to the Reporter's stenographic transcript of the hearing filed with the Court are designated "Tr." References to exhibits introduced by the General Counsel are designated "GC Ex." References to exhibits introduced by Petitioners are designated "Pet. Ex."

in: on October 1, 1964, the discriminatee would, as found by the Board, have voluntarily terminated his employment relationship with Golden State; on January 31, 1968, Golden State sold and transferred its entire soft drink bottling and distribution operation to All American; and on December 11, 1968, the discriminateee was offered reinstatement to his former position. The failure of the Court of Appeals to come to grips with the consequences of these three separate sets of events (elaborated below) in its Opinion is, Petitioners submit, a primary cause of its failure to render a decision in conformity with existing law.

In October of 1964, Golden State began phasing out a substantial portion of its soft drink business which had until then been serviced by employee driver-salesmen. A number of these were replaced by independent distributors with whom Golden State entered into sub-franchise agreements and who were, in every respect, independent businessmen [R. 113, lines 13-20; 119, lines 19-34; Tr. 224, lines 6-18; 252-254; Pet. Ex. 3]. Within a short time after October of 1964, Golden State had terminated over fifty percent of its distribution operation and turned it over to such independent distributors. The Board expressly held in this matter that these independent distributors were, in fact, independent contractors under the Act [R. 119, lines 20-25; 113, lines 12-20]. While it is true that many of the former driver-salesmen were offered such independent distributor contracts, by no means all of them were given that opportunity [Tr. 189; 196-197; 208; GC Ex. 18B]. By this change:

1. Golden State went out of the soft drink distributing business in October of 1964 as to those routes which were contracted out to independent

distributors. Those driver-salesmen who became distributors voluntarily left the employ of Golden State to become independent distributors.

2. Golden State continued to bottle Pepsi-Cola products, but remained in the distribution business only in the geographical areas still covered by its remaining employee driver-salesmen. Thus, Golden State was always in a position to offer full and complete reinstatement to Baker as a driver-salesman, until the later sale of the balance of its Pepsi-Cola division to All American.

The Supplemental Decision expressly held in this matter that Baker would have been offered an independent distributorship in October of 1964 had he not been previously terminated and that he would have accepted the same (contrary to Golden State's contention before the Trial Examiner) [R. 120, lines 25-27].

Thereafter, on January 31, 1968, Golden State sold its entire Pepsi-Cola bottling division to All American [R. 113, lines 51-57]. Under the sale agreement, All American purchased the assets of the Pepsi-Cola operation and assumed specifically enumerated liabilities. The independent distributorship contracts were assigned by Golden State to All American as a part of that transaction [GC Ex. 15; Tr. 74]. This sale terminated all activities of Golden State in the soft drink bottling or distribution business.

It is absolutely clear from this record that All American had no actual knowledge whatever of the litigation over Baker's discharge prior to the time it acquired this portion of Golden's State's business, *i.e.*, January 31, 1968. The uncontradicted evidence, largely pre-

sented by the General Counsel in the hearing before the Trial Examiner, reflected that because of the long appellate hiatus from April of 1966 to November of 1968, the pendency of this matter had simply been overlooked by the officers of Golden State [Tr. 57, 72-74, 80-83]. It was, after all, regarded by Golden State as a normal back pay case [see Pet. Ex. 1; GC Ex. 22, received by Golden State in March of 1969] and since Baker had promptly obtained other substantial employment [see record of interim earnings, R. 125], the amount of back pay which would normally be due and payable to him, but for the Board's novel order made herein, would not have been substantial.

The sale agreement made no mention whatever of the pending Baker case. To the contrary, it actually contained a warranty that no legal proceedings were pending [GC Ex. 15 a, para. 10.5].

The Board, unable to find any evidence of such knowledge in the record, relied upon its disbelief of the General Counsel's witnesses, who testified no knowledge existed, and upon the adverse inference it drew from the failure of officers of All American to travel from Rhode Island to corroborate these witnesses as "evidence" establishing knowledge. Considerable evidence was introduced on the point, all of which indicates knowledge did *not* exist, but Petitioners feel that it is inappropriate to review such evidence at this time.

Subsequent to the sale, All American continued the bottling operation retaining virtually all employees. Mr. Gene Schilling, General Manager of the Pepsi-Cola operation under Golden State, continued on in this capacity with All American with the title of "President" of the Sacramento bottling division.

Summary of Argument for Allowance of the Writ.

The issues in this case may be grouped under two principal heads:

(a) Those relating to the extent to which remedial liability for unfair labor practices can be imposed against the seller/predecessor and the purchaser/successor of a business; and

(b) Those relating to the sweep of the remedy itself without regard to the party against whom imposed.

As to the first group, the court's Opinion below, and the Board decision which it enforces, contravene settled lines of authority established by this Court and the holdings of other circuits and therefore tenders to this Court the necessity of resolving an irreconcilable conflict on questions of fundamental importance in the field of labor law.

The latter group of questions present two issues of first impression which require decision by this Court, as well as a third issue which the Opinion decides in such a manner as to create a further irreconcilable conflict.

In the area of Seller/Purchaser liability, the court below has adopted and applied, for the first time in its full sweep, the Board's so-called "*Perma-Vinyl* doctrine". Only twice before has this doctrine been considered by Courts of Appeals—once by way of dictum, in the Court of Appeals for the Ninth Circuit[7] and earlier, by way of partial application only, in the Court of Appeals for the Fifth Circuit.[8]

In its extension of liability to both predecessors and successors, in the sale and transfer of a business,

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[7]*United Auto Workers v. NLRB,* 442 F.2d 1180 (9th Cir. 1971).

[8]*United States Pipe and Foundry Company v. NLRB,* 398 F.2d 544 (5th Cir. 1968).

the *"Perma-Vinyl* doctrine," first enunciated by the Board in the decision of that name (*Perma Vinyl Corp.*, 164 NLRB No. 119, 65 LRRM 1168 (1967), contravenes two distinct lines of authority established by this Court and followed in other circuits. The conflict thus posed can only be resolved by this Court.

Even should the resolution of this conflict by the Court result in the adoption and approval of the *"Perma-Vinyl doctrine"*, however, a further issue, in the within cause, would be presented by reason of the Board's failure to establish the purchaser's prior knowledge of the seller's unfair labor practices, a requisite for the application of the doctrine in any event. In this regard, Petitioners seek a determination of the question whether the technical devices resorted to by the Board and the court in an effort to raise and support such a finding are not offensive to the fundamental notion of due process.

Under the second basic head, two questions of first impression, involving the extent of the Board's remedial powers under the Act are presented. Petitioners will urge that the order which required the Petitioners herein, ostensibly by way of of reinstatement, to establish the discriminatee Baker in an independent business, exceeds such powers. Additionally, it will be argued that a purported back pay award which, in actuality, amounted to an order to pay consequential damages in the form of anticipated profits in an independent business likewise exceeded such powers.

As a final sub-issue in this latter connection, Petitioners will argue the question of whether the voluntary termination of employment by the employee should not also terminate any further liability of Petitioners to remedy unfair labor practices, consonant with earlier Board and court decisions, but in contravention to the court's holding herein.

ARGUMENT FOR ALLOWANCE OF WRIT.

I.

The Board's "Perma-Vinyl Doctrine" Contravenes the Established Authority of This Court and of Several Courts of Appeals and Therefore Creates a Conflict on Important Issues of Law Which Must and Can Only Be Resolved by This Court.

In *Perma Vinyl Corp., supra,* enforced in part only, *sub. nom. U.S. Pipe and Foundry Co. v. NLRB,* 398 F.2d 544 (5th Cir. 1968), the Board required a bona fide purchaser/successor corporation having knowledge, at or before the time of sale, of its predecessor's prior unfair labor practices, to offer reinstatement to employees discharged in violation of the Act. It did not require the purchasing corporation to pay remedial back pay; it did not hold the selling corporation liable for reinstatement or for back pay beyond the date of the sale. However, the Board did not stop there. It announced that thenceforth, as a rule of prospective application, even though a purchaser and the sale itself be wholly bona fide, in a genuine transfer of ownership, the Board would nonetheless hold the seller *and* the buyer liable *jointly and severally* for both reinstatement *and* back pay, if the purchaser took with prior knowledge of the unfair labor practice proceeding.

In so doing, it not only far exceeded the scope of its holding in the case before it; it also reversed itself on its own established doctrine and contravened several prior Court of Appeals holdings and at least two decisions of this Court on the points in question.

Two fundamental aspects of remedial liability are involved: those of a predecessor/seller, and those of a successor/purchaser.

Prior decisions of this Court and other circuits were and are clear that the accrual of liability on the part of a bona fide seller to remedy unfair labor practices is terminated by the bona fide sale and transfer of the business in question.

Textile Workers v. Darlington Mfg., Co., 380 U.S. 263, 13 L.ed.2d 827, 85 S.Ct. 994 (1965), (herein referred to as *"Darlington"*);

NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954), (herein referred to as *"New Madrid"*);

NLRB v. Herman Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963), (herein referred to as *"Herman Pet Supply"*);

Makela Welding, Inc. v. NLRB, 387 F.2d 40, (6th Cir. 1967), (herein referred to as *"Makela Welding"*).

Prior to *Perma-Vinyl* it had been equally clear, from settled decisions of this Court and other circuits, that the bona fide purchaser of a business, in a transaction which constituted a genuine arms-length, non-collusive sale and transfer, took free of any liability for the predecessor/seller's unfair labor practices, whether such purchaser took with or without knowledge thereof.

Regal Knitwear v. NLRB, 324 U.S. 9, 89 L. ed. 661, 65 S.Ct. 478 (1945); (herein referred to as *"Regal Knitwear"*);

NLRB v. Birdsall-Stockdale Motor Company, 208 F.2d 234 (10th Cir. 1953); (herein referred to as *"Birdsall-Stockdale"*);

NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954); (herein referred to as *"Lunder Shoe"*);

NLRB v. Herman Bros. Pet. Supply, supra.

Perma-Vinyl not only conflicts with the foregoing two lines of authority; it also conflicts with previously announced and settled Board doctrine on the same point:

> *Symms Grocer Co.*, 109 NLRB No. 58, 34 LRRM 1326 (1954); (herein referred to as *"Symms Grocer"*);
>
> *M. Eskin & Son*, 148 NLRB No. 107, 57 LRRM 1121 (1964); (herein referred to as *"Eskin"*).

The foregoing three separate lines of authority will be developed and discussed below in examining their specific application to the holding in the case at bar. For the moment, let us continue our examination of *Perma-Vinyl* itself.

The Board decision therein was reviewed, on enforcement proceedings, by the Court of Appeals for the Fifth Circuit, *sub. nom. U.S. Pipe and Foundry Co. v. NLRB, supra* (herein referred to simply as *"U.S. Pipe and Foundry"*). In so doing, the court reviewed the history of the rule involved, taking notice of contrary decisions, principally those of *Birdsall-Stockdale, supra*, and *Lunder Shoe, supra*. The court did not attempt to reconcile the conflicting lines of authority, but in effect settled for the fact that it disagreed with them and agreed with the Board's rationale—up to a point. It enforced the decision in respect of its specific holding only, that is to say, in requiring the successor to offer reinstatement only, and it pointedly withheld approval of the balance of the Board's broad language, particularly that affecting joint and several liability of successors and predecessors in every respect, and further, particularly, in the area of liability for back pay.

In brief, *U.S. Pipe and Foundry* gave something considerably less than unqualified approval to the *"Perma-Vinyl* doctrine", as the Board view it.

In *United Auto Workers v. NLRB,* 442 F.2d 1180 (9th Cir. 1971) (herein referred to as *"United Auto Workers"*) the Ninth Circuit declined to enforce liability for the predecessor's unfair labor practices against a bona fide purchaser corporation which took, *arguendo,* with knowledge where the business, after changing hands, was not essentially the same as previously. This was the extent of the court's holding. Nevertheless, in a concluding paragraph, the court, by Judge Tuttle (on assignment from the 5th Circuit), went on gratuitously to express uncritical approval of the entire breadth and sweep of *Perma Vinyl,* omitting even the *caveats* expressed in *U.S. Pipe and Foundry,* by his own Circuit. This language, we submit, is quite beyond the actual holding and therefore *dictum* in the premises.

Until the Board and court holdings below in the case at bar, the so-called *"Perma-Vinyl* doctrine" amounted to no more than that, namely, an announced policy which had never actually been fully applied in a decided case. The case at bar translates *Perma-Vinyl* from the realm of announced doctrine into actual holding, and thus, for the first time, poses the full conflicts envisaged by the court in *U.S. Pipe and Foundry.*

The full extent of these conflicts may be understood only when one realizes that *Perma-Vinyl* used the bona

fide sale and transfer of a business not as an event which serves to limit liability, but rather as one which operates to *extend* and *broaden* it. It does not restrict the liability of the parties; instead it adds to the picture another party against whom full recourse may equally be had.

The curious thing is that the Board itself, in formulating the doctrine, did not address itself to the contrary authority posed by its own *Eskin, Symms Grocer* line of decisions, or even advert to the *Darlington/New Madrid/Herman Pet Supply/Makela/Regal Knitwear/ Lunder Shoe/Birdsall-Stockdale* lines of authority. Nor did it answer the arguments posed by these cases. It simply avoided them (although it cited, inexplicably, *Regal Knitwear.*) It relied, instead, upon cases totally inapposite: *Wiley & Son v. Linvingston,* 376 U.S. 543, 11 L.ed. 2d 898, 84 S.Ct. 909 (1964); (herein referred to as *"Wiley"*), a case which, as we point out below, involved contractual liability, and two other cases, one similarly involving contractually or specifically assumed liability: *Liberty Electronics Corp.,* 143 NLRB No. 64, 53 LRRM 1370; *NLRB v. Colten,* 105 F.2d 179 (6th Cir. 1939). In the latter case, there was simply no true change of ownership, and therefore no genuine sale.

In other words, none of the authority cited by the Board in the original *Perma-Vinyl* case dealt with or even acknowledged the thrust of the prior and superior authority opposing the doctrine it announced.

With this history and background in mind, we turn to a specific examination of *Perma-Vinyl* in action, as applied in the case at bar.

A. The Application of the Perma-Vinyl Doctrine to Extend Golden State's Liability for Remedial Action Past the Cutoff Point of a Bona Fide Sale Conflicts Irreconcilably With Decisions of This Court and Principles of Due Process.

The Board found that Golden State's sale of its Pepsi-Cola division was a genuine sale and transfer of the whole of that business, at arms-length, to a bona fide purchaser which, until that time, had been, in fact, a stranger to the operation and to Sacramento. With that transaction, Golden State went out of the soft drink bottling and distribution business and terminated all activity in that and related fields. Following the sale, Golden State was, therefore, no longer capable of offering reinstatement to Baker; much less was it in a position to perform on such an offer.

The law applicable to such a situation is set forth in *Darlington, supra,* wherein this Court cited with approval, in support of its holding, the following language from *New Madrid* (380 U.S., at page 271):

> " 'But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing . . . has occurred.' "

More specifically pertinent to the point before us here is the following further language from *New Madrid* itself, not actually quoted by this Court in *Darlington,*

but certainly approved by implication (215 F.2d, at page 914):

> "And the Act affords no basis on which to order a person to reinstate employees in a business which he has . . . actually disposed of to another, and as to which he neither in law nor in fact possesses any power over the operations of his successor, either of management right in general or of labor relations control in particular . . . No more, in our opinion, can the Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing or abdicating sale of the enterprise."

The Court of Appeals for the Sixth Circuit affirmed and applied these same rules in the more recent cases of *Makela Welding, supra,* and *Herman Pet Supply, supra.*

The foregoing line of authority clearly would exonerate Golden State from further accrual of remedial liability past the time of the sale, whether for back pay accrual or reinstatement.

The Board decision herein, based on *Perma-Vinyl,* held directly contrary, finding Golden State liable for "back pay" and reinstatement in the same breadth and extent as though the sale had never taken place. One may search the original decision in *Perma Vinyl,* in vain for an authority to support this aspect of the holding. Equally absent is any mention of the foregoing contrary authority.

The court below, in its Opinion, attempted to skirt this issue by pointing out that Golden State had agreed to indemnify All American for any post-sale liability which might be adjudged against it. In the court's

view, Golden State was thus liable for back pay and reinstatement on an independent basis and, the court concluded, it was not necessary for it to decide the question of the seller's post sale liability.

The Opinion, however, totally misses the point that any post-sale liability of Golden State rests inevitably upon *Perma-Vinyl,* whichever basis is selected, since All American's adjudged liability was also based upon the same doctrine (as we discuss below). Golden State's adjudged liability, therefore, whether one views it as primary or secondary, still depends upon the soundness of *Perma-Vinyl.*

Furthermore, the court's Opinion enforced the Board's decision *without modification* (see Proposed Order, Appendix C below). Clearly an order enforcing remedial liability against a party for an unfair labor practice, carrying with it the potential sanction of contempt proceedings, cannot be adjudged or ordered on the basis of a private contractual commitment. It can only be bottomed on the provisions of the Act itself, and the court's unlimited order of enforcement, therefore, despite the language above discussed, *necessarily* constitutes a holding and order in this respect.

The Opinion also ignores the implications of holding the seller liable for the performance of an act, namely reinstatement, which it is incapable of performing. The absurdity of such a ruling is underscored by the Board's own holding that the offer of reinstatement made to Baker eleven months following the sale was invalid because its author (an employee of All American who had formerly been with Golden State) was, in the Board's view, purporting to represent Golden State in making the offer (a finding not justified by the evidence).

Thus the court and the Board are holding, on the one hand, that Golden State has continuing liability to offer and perform reinstatement but that, on the other hand, any such offer or attempt to perform is void, *ipso facto.*

Just what, one might ask, could Golden State do after the sale to terminate its liability? The holding literally imposes liability *ad infinitum* while, at the same time, denying to the seller the means of complying with what was ordered. Such an order offends the most fundamental notions of justice and fair play to the extent of violating the basic precepts of due process. *Rochin v. California,* 342 U.S. 165, 96 L.ed. 183, 72 S.Ct. 205 (1951).

We believe it is clear from the foregoing that the decisions herein create a conflict and an anomaly which can only be resolved by this Court.

B. The Application of Perma Vinyl to Fasten Unlimited Liability Upon All American, Both Retrospectively and Prospectively, Conflicts With Decisions of This Court and Those of Other Courts of Appeals and, Additionally, Constitutes a Denial of Due Process.

It is undisputed that All American was a bona fide purchaser of Golden State's soft drink bottling operation, that it was a stranger to the business and in no way identified with its predecessor or its predecessor's unfair labor practices. It is further undisputed that the sale was wholly bona fide, that it resulted in a genuine transfer of the seller's entire interest. It was not even suggested, therefore, that the transaction was collusive or entered into as a part of any scheme or plan to evade or frustrate the Board's original order.

In other words, All American was wholly innocent of wrongdoing; there was no evidence whatever of any conspiracy, fraud, evasion, or other basis for independent liability on its part. There existed, therefore, no basis or relationship, "which might of itself establish liability" against All American. *Regal Knitwear*, 324 U.S., at page 15.

Furthermore, All American was not made a party to the wrongful discharge proceedings and was provided no opportunity to participate in the litigation of that matter. To the contrary, it merely purchased the bottling business without assuming this liability from a seller which had warranted, in the purchase agreement, that no litigation pended.

Under settled principles, All American could not, thus, be held to answer for the unfair practices of Golden State. Nevertheless, the Supplemental Decision, and the Opinion in turn, fastened upon All American total liability, jointly and severally with Golden State, for reinstatement and back pay accruals, both before as well as after the sale.

The proposed Order was drawn in the language of Rule 65(d) of the Federal Rules of Civil Procedure. The cited authorities were those discussed above: *Perma Vinyl, U.S. Pipe and Foundry* and *United Auto Workers.*

In *Regal Knitwear, supra,* this Court specifically held that Rule 65(d) could not be used to extend the reach of Board orders to "successors" or "assigns" who were innocent of wrong-doing and against whom there existed no independent basis for adjudging liability. In so doing, the Court clearly excluded the notion that a purchaser, simply by taking with knowledge of

a predecessor's peculations, could be held to answer in the same measure, if the sale were otherwise bona fide and the transfer of ownership genuine.

As stated by this Court in that case (324 U.S., at page 13):

> "The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not yet been adjudged according to law."

Further, the language of the Act itself prohibits such an extension of liability. Section 10(c) thereof provides, in pertinent part, as follows:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any *person named in a complaint has engaged or is engaging in any* such *unfair labor practice,* then the Board . . . shall issue and cause to be served *upon such person* an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (Emphasis added).

With this language in mind, the Board itself stated, in *Symms Grocer,* as follows:

> "Having re-examined the legal basis for its determination in the original decision herein that Idaho [successor] was responsible for remedying the unfair labor practices of Symms, the Board now believes that it lacks any statutory authority to make any such determination. Section 10(c) of the Act empowers the Board to require unfair

labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein." (34 LRRM, at page 1327).

This line of reasoning was again confirmed by the Board in its decision in *Eskin, supra.*

The Board reasoning in this respect finds its echo in the direct holdings of no less than three Circuits. One of the first to deal with the subject was the case of *Birdsall-Stockdale, supra,* where the court stated (208 F.2d, at page 237):

"While administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, the courts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

"Where successors and assigns are in active concert or participation with a defendant or respondent in the violation of an order, or are instrumentalities through which the defendant or respondent seeks to evade an order, they are brought within the scope of contempt proceedings by Rule 65(d), supra.

"Orders of the National Labor Relations Board are binding upon successors and assigns whose operations are 'merely a disguised continuance of the old employer' . . .

"The Supreme Court, in the *Regal Knitwear* case, made it clear that those decisions were pred-

icated, not merely on succession, but on a consideration of the relationship between the defendant and the successor which might *of itself* establish liability within the terms of Rule 65(d), a relationship not present in the instant case." (Emphasis supplied).

This position was echoed by the First Circuit in *Lunder Shoe, supra* (1954), and again by the Sixth Circuit in *Herman Bros. Pet Supply, supra* (1963), in which the courts held that if there was, in fact, a bona fide discontinuance and true change of ownership, the new owner would not be subject to the Board's order, and the duty of reinstatement thereby terminated.

Opposed to this unbroken line of authority, *Perma Vinyl* stands virtually alone, except for the limited holding in *U.S. Pipe and Foundry*, the dictum in *United Auto Workers* and, finally, the square holding in the case at bar.

As we observed above, the Board, in the original *Perma Vinyl* decision, dealt with the wealth of authority opposing its conclusions by the simple expedient of ignoring it. It attempted to support its holding principally by reliance upon the decision of this Court in *Wiley & Sons v. Livingston, supra,* a case having nothing to do with unfair labor practices, but dealing instead with obligations which, as noted by the Court, were contractual and therefore consensual in origin. *Wiley* was limited to a decision regarding a successor corporation's liability to arbitrate certain issues pursuant to the collective bargaining agreement executed by its predecessor. Its extension, by analogy, to the liability of a successor for the unfair labor practices of a predecessor, was specifically rejected by this Court,

when the contention was advanced to it, in the case of *NLRB v. Burns International Security Service,* .... U.S. ...., 32 L.ed.2d 61, ... S.Ct. .... (1972). The problem was dealt with in the following language (32 L.ed., at page 72):

> "We do not find Wiley controlling in circumstances here. Wiley arose in the context of a Section 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of Section 8(d). That decision emphasized 'the preference of National Labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate 'construed in the context of National Labor Law,' survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract. ID., at 549, 551."

The Court went on to state, on the same page:

> "Its [Wiley] narrow holding dealt with the merger occurring against a background of State law which embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."

In other words, if *Wiley* itself did not make it quite clear, *Burns International Security Service, supra,* doubly underscored the fact that *Wiley* was not authority for extending or even affecting settled principles regarding the liability of successors in unfair labor practice cases.

The force of this authority (*Burns*) was quite apparent to Judge Kilkenny in the case at bar, who based his dissent, as to the portions of the opinion dealing with predecessor/successor liability, squarely upon the authority of this decision, observing that it could not be reconciled with *Perma Vinyl.*

The anomaly created by *Perma Vinyl* is not restricted to the field of labor law, for it is equally offensive to settled principles at common law which, generally speaking, refused to hold a successor/purchaser liable for the torts of a seller/predecessor unless such liability had been specifically assumed. See, for example, *Schwartz v. McGraw Edison Co.*, 14 Cal.App.3d 767, 92 Cal.Rptr. 776 (1971); *Kloberdanz v. Joy Mfg. Co.*, 288 F.Supp. 817 (D.C. Colo. 1968).

The persuasiveness of these common law cases becomes quite important when one realizes that, as pointed out above, *Wiley* resulted from state law requiring the result rendered therein. In the case at bar, state law requires a result opposite to that reached in the court below.

Petitioners urge that the conflict posed by *Perma Vinyl*, in this aspect of its application to the case at bar, can only be resolved by this Court. They further submit that it must not only yield to the weight of opposing authority, but that it must fall for lack of any sound basis or authoritative support in the first instance.

C. Perma Vinyl Is Inapplicable to Establish Liability Against All American in Any Event, Since the Essential Element of Knowledge Cannot, Consistent With Due Process, Be Established on This Record.

Even *Perma Vinyl* does not purport to hold a successor liable for remedial action where it takes with no prior knowledge of its predecessor's unfair labor practices.

On this issue, of course, the General Counsel had the burden of proof, a burden which it failed to sustain in the instant case. The record below not only reveals the absence of any evidence tending to establish pre-sale knowledge of Golden State's unfair labor practice on the part of All American, it discloses that the only evidence directly bearing on the point positively negates the existence of such knowledge. This evidence was given by two officers of Golden State, both called by the General Counsel to testify on the point.

With this testimony in the record, Petitioners, on their case, did not feel it necessary to summon officers of All American all the way across country from Rhode Island merely to corroborate what the officers of Golden State had already testified to, particularly since it was an issue on which Petitioners did not have the burden.

The Board, hard put to find a basis on which to conclude that All American had knowledge, turned the trick by an ingenious, if unacceptable, solution: it simply discredited the two witnesses on the point and then raised an "inference" of knowledge, based upon Petitioners' alleged failure to call officers of All American to testify on the point.

This specious tactic was challenged before the court below, which evidently agreed with Petitioners

that the point was untenable, since it upheld the finding of knowledge by resorting to a totally different device. It observed that All American, after the sale, had retained in its employ, certain supervisory personnel who had formerly been employed by Golden State and had been privy to the commission of the unfair practices in question. Wholly on the basis of this continuity in the identity of the operation itself and the personnel involved in it, the court held that All American could be properly charged with knowledge of its predecessor's unfair labor practice. While the court does not use the term, the only conceivable basis for so finding, would be knowledge by imputation.[9] We believe this holding to be as untenable as the Board's, and equally repugnant to principles of due process.

Any knowledge attributable to All American on this basis is a technical fiction and cannot take the place of actual knowledge. Furthermore, since the retainer of the personnel and, in fact, the actual acquisition of the business was, by definition, post-sale, the knowledge cannot be imputed to the purchaser at the time of or prior to the sale itself, except by doing so *ex post facto*. Such technicalities and devices are not appropriate to our concepts of justice or fairness, and certainly cannot be utilized to support a finding which flies in the face of the evidence and the actual facts.

It does not require great acumen to appreciate that if this type of reasoning should prevail generally, the whole concept of an innocent purchaser without knowledge would disappear, since the purchaser would invariably and inevitably be tainted *ex post facto* by what it

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[9]"Imputation" was the actual term used by the court in the course of the oral argument.

had acquired. There simply could be no such thing as a non-bona fide purchaser without knowledge. *Ergo,* actual pre-sale knowledge or no actual pre-sale knowledge, *Perma Vinyl* would be applicable in all instances.

In *Tot v. U.S.,* 319 U.S. 463, 467; 87 L.ed. 1519; 63 S.Ct. 1241 (1942), the Court stated:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

Furthermore, in *Rochin v. California, supra,* the Court stated on page 169:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses.'. . ."

Petitioners submit that the devices resorted to by the Board and the court to raise an "inference" of knowledge, in the absence of evidence thereof, constitute a denial of due process which can, and must, be rectified by this Court.

II.

Does the Scope of the Remedial Order Affirmed and Enforced Below Exceed the Powers Granted to the Board by the Act?

From the remedial aspects of the Supplemental Decision as confirmed by the Court of Appeals, arise three further issues, including two of first impression: (a) Can any remedial action be required past the time when an employee would have terminated his employment relationship; (b) Can the Board order an employer to "reinstate" an employee into a non-employment situation, *i.e.*, an independent business;[10] and (c) Can an employer be required to pay, under the guise of a "back pay" order, anticipated profits of an independent business.[10]

A. Does the Board Have the Remedial Authority to Continue the Accrual of Liability for Reinstatement Beyond That Date When the Employee Would Have Voluntarily Terminated the Employment Relationship?

Golden State's conversion of the several routes which became independent distributorships commenced on or about October 1, 1964. It was originally contended by Golden State below that Baker would not have been offered such a distributorship and that the issue of his reinstatement and back pay therefore related only to the position and pay of an employee driver-salesman.

The Board contended otherwise, however, and, on conflicting evidence, concluded and found that on October 1, 1964, Baker would have been offered and would have accepted a distributorship, thus definitely termi-

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[10]During the course of the oral argument before the Court below, the General Counsel, in response to a query from the Court, conceded that these issues constituted matters of first impression.

nating his employment relationship with Golden State [R. 120, lines 25-33].

As earlier noted, Petitioners throughout have contended (a contention not disputed by the General Counsel below), and the Board expressly found, that these distributorships were independent businesses and the distributors themselves independent contractors. See, for example, the following excerpt from the Supplemental Decision:

> "Respondent began converting its driver-salesmen to distributors, or *independent contractors*, by offering each of them . . . contracts as distributors, or *independent contractors*, under the terms of which they realized net profits, after the deduction of their operating expenses, from the purchase of the products from Golden State and the resale to customers . . ." [R. 119, lines 20-25]. (Emphasis added).

See also R. at 113, lines 12-20.

It is thus clear that the Board's finding with respect to Baker's acceptance of a distributorship means that on October 1, 1964, he would have left the employ of Golden State to go into business for himself.

Under the rule enunciated by the Board in *Mastro Plastics Corp.*, 136 NLRB No. 119, 50 LRRM 1006, an employer's liability for reinstatement and further back pay accruals ceases to run beyond the date on which the discriminatee would have voluntarily left that company's employ. In that case, the Board said at pages 1009-1010:

> "Only if the evidence supports a finding that the claimant would have left Respondent's plant . . . in order to obtain this particular new job is his

claim from that time disallowed. *A claimant who goes into business on his own is treated similarly to one who obtains interim employment.*" (Emphasis supplied).

Mastro Plastics was enforced in 354 F.2d 170 (2nd Cir. 1965) and impliedly approved by this Court, which denied certiorari (384 U.S. 972).

The Board's and the court's decisions in the case at bar extended Golden State's liability past this cut-off point to create yet one more conflict with settled Board and court law which can only be resolved by the definitive pronouncement of this Court.

It is also apparent that a decision of this issue in accord with the rule announced in *Mastro Plastics* would definitively resolve, by mooting, all other issues tendered in this case, since questions of successorship and other aspects of remedial liability would never be reached.

B. Has the Board Exceeded the Power Granted to It Under the Act by Ordering Petitioners to Establish the Discriminatee in an Independent Business?

On December 11, 1968, within fifteen days subsequent to the final determination that Baker's discharge constituted an unfair labor practice, Mr. G. Schilling, President of All American's Sacramento Division, conveyed an offer of reinstatement to Baker [Pet. Ex. 1]. In so doing, Mr. Schilling was attempting to comply with the Board's Order which required him to:

"... offer Baker immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings occasioned by such discrimination by payment to him

of a sum of money equal to that which he would normally have earned from the date of such discrimination until the date of reinstatement, less his net earnings during that period."

The Board, however, held this offer invalid for the reason that an offer of a position as driver-salesman was insufficient since, but for the discrimination, Baker would have become an independent distributor.

It is readily apparent that any requirement that Baker be "reinstated" as an independent contractor exceeds the scope of the Act and the powers granted to the Board thereunder. Review of the language contained within the Act leaves no doubt that its ambit is limited to the employee-employer relationship. The evidence of this fact is found within the Declaration of Policy under the Act which states:

> "It is the purpose and policy of the Act . . ., to proscribe the legitimate rights of both employees and employers in their relations affecting commerce, . . ."

Furthermore, Section 10(c) of the Act, in enumerating potential remedies, states that a person committing an unfair labor practice may be required to cease and desist from such unfair labor practice, and to make such affirmative action including reinstatement of employees with or without back *pay*, as will effectuate the policies of this Act.

The Order rendered in this matter, as set forth above, conforms with this limitation. The offer of reinstatement to Baker as a driver-salesman conformed with the precise terms of this Order in that he was offered a position in the Pepsi-Cola Bottling Company.

If the Petitioners had attempted to conform with the Order by offering Baker a contract under which he could establish an independent business, this would have been an insufficient compliance in that no "position" would have been offered.

The Opinion of the Court below attempts to avoid this fact by citing authority to the effect that it is properly within the Board's power to reinstate an employee to a position, not covered by the Act, to which the employee would have been promoted or transferred. *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236-7 (2nd Cir. 1953).

Petitioners do not dispute the validity of the cited authority. They argue, instead, that it offers no support to the proposition for which it is cited but, rather, lends weight to the position urged by Petitioners themselves. The Act was intended to deal only with matters touching the employer/employee relationship. Promotions, even to those involving supervisory capacity, still involve the relationship of *employment*.

It is quite obvious that relationships between independent businesses are not, and never have been, covered by the provisions or the policies of the Act. The attempted extension of Board power sanctioned by the Opinion is one of first impression and represents a view of the Board's remedial authority which is unique to say the least.

The dissenting opinion of Judge Kilkenny, recognizing the order in its present form deals with such relationships between independent businesses (*Brown v. NLRB*, 462 F.2d 699 (9th Cir. 1972)), determined that it exceeded the powers of the Board.

Petitioners likewise urge that such an order is excessive and requires definitive consideration and pronouncement by this Court.

C. Has the Board Exceeded the Power Granted to It Under the Act by Ordering the Petitioners to Pay, Ostensibly as "Back Pay," Consequential Damages Based on Alleged Loss of Anticipated Profits of a Business?

The "back pay" Order enforced below directed Petitioners to pay to Baker, for the period subsequent to October 1, 1964, not wages or salary which he might have earned as an employee, but rather, anticipated profits which he allegedly would have earned had he gone into business as an independent distributor on that date.

What this amounts to is an order to pay compensatory damages based upon anticipated—and wholly speculative—profits which might have been earned in a business which was never begun, by a person who had never before been in business for himself.

This Order and the Opinion enforcing it are matters of first impression.

No special authority is cited to sustain this novel and remarkable conclusion other than the standard authority contained in the Act itself relating to back pay awards[11] and cases decided pursuant to that unquestioned authority. The opinion overlooks other au-

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[11]Section 10(c) of the Act, 29 U.S.C. 160(c):
". . . the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back *pay*, as will effectuate the policies of this Act . . ." (emphasis supplied).

thority which clearly excludes the extension of the Board's "make whole" powers to such length.

The Board itself, in *Isis Plumbing and Heating Co.*, 138 NLRB No. 97, 51 LRRM 1122 (1962) observed that

> "Back pay . . . is not a fine or a penalty imposed on the Respondent . . . it is an *indebtedness* arising out of an obligation imposed by statute, an incident fixed by law to the *employer/employee* relationship." (Emphasis added).

Moreover, in that same case, two dissenting members of the Board were at pains to point out that the remedy of back pay, specifically mentioned in the Act (§10-(c) thereof) represented a deliberate choice by Congress between competing policies, and that in making such choice, the Congress specifically rejected the suggestion that the Board be empowered to award compensatory damages and specifically limited it to the remedy for lost *wages*.

It is thus doubly clear that Congress empowered the Board to order remedies which restored emoluments flowing from the employment relationship alone, but specifically excluded it from any power to award generally damages particularly those stemming from non-employment relationships.

It is also clear that the court below was of two minds on the subject, since one of the cases cited by Judge Kilkenny in his dissenting opinion, *Brown v. NLRB, supra,* emphasizes the impact upon this issue of the fact that the distributorships were independent businesses and the distributors themselves independent contractors.

The Board's Order and the Opinion itself, in this respect, are equally offensive to settled concepts of damages in the common law, even were that context appropriate, since the damages awarded were wholly speculative, being profits allegedly anticipated from a "start-up" business with no prior operation or earnings history whatever. See, for example, *Macmorris Sales Corporation v. Kozak*, 263 Cal.App.2d 430, 69 Cal. Rptr. 719 (1968); *Handley v. Guasco*, 165 Cal.App. 2d 703, 322 P.2d 354 (1958).

The validity of these concepts is underscored by the fact that in the instant case, two of the driver-salesmen who became independent distributors for Golden State went bankrupt [R. 271-273], while two other driver-salesmen who accepted distributorships, later asked for and obtained back their former positions as driver-salesmen for the reason that they had been unable to make a go of it as distributors [R. 272].

In any event, the Board's power does not reach into this area, and its attempt to do so, as enforced by the Opinion below, is one of first impression which requires review and decision by this Court.

III.

Conclusion.

The irreconcilable conflict between the Supplemental Decision and the Opinion below, on the one hand, and settled decisions of this Court followed in numerous other circuits, on the other hand, as well as the novel and remarkable questions of first impression presented, cast into doubt and uncertainty important and frequently applied areas of labor law.

The conflict thus posed, and the questions thereby presented, can only be resolved by definitive pronouncement of this Court. Petitioners therefore urge the granting of this Writ in order to assure such consideration and determination.

Respectfully submitted,

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Attorney for Petitioner Golden State.

GILFORD G. ROWLAND,
Attorney for Petitioner All American Beverages, Inc.

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JACKSON, GOODSTEIN, KUMLER,
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ROWLAND, CLOWDUS & PARKER.

APPENDIX A.

Trial Examiner's Supplemental Decision.

TXD-(SF)-106-70
Sacramento, Calif.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Golden State Bottling Company, Inc. d/b/a Pepsi Cola Bottling Company of Sacramento, and All American Beverages, Inc. d/b/a Pepsi Cola Bottling Co. of Sacramento[1] and Edward J. Farrell, An Individual and P.C.B.C.E., Inc., Party to the Contract. Case No. 20-CA-2656.

Douglas H. Barton, Esq., for the General Counsel; *Jackson, Kumler, Copes & Croskey*, by *Morton B. Jackson, Esq.*, and *Stanley Feldsott, Esq.*, of Los Angeles, Calif., for Respondents.

Statement of the Case

ROBERT L. PIPER, Trial Examiner: On June 10, 1964, the National Labor Relations Board issued its Decision and Order,[2] finding that on August 16, 1963 Respondent Golden State Bottling Company, Inc., d/b/a Pepsi Cola Bottling Company of Sacramento (hereinafter called Golden State), had discriminatorily discharged Kenneth L. Baker in violation of Section 8(a)-(3) and (1) of the Act, and ordering Golden State, its officers, agents, successors and assigns, to offer Baker immediate and full reinstatement to his former or sub-

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[1]At the opening of the hearing upon unopposed motion of the General Counsel the caption was amended to include All American Beverages, Inc.

[2]147 NLRB 410 (1964).

stantially equivalent position and make him whole for any loss of earnings occasioned by such discrimination by payment to him of a sum of money equal to that which he would normally have earned from the date of such discrimination until the date of reinstatement, less his net earnings during that period. On December 2, 1965, United States Court of Appeals for the Ninth Circuit issued its decision[3] affirming and enforcing, *inter alia*, the Board's Order with respect to Baker. Because of a request by the Board for rehearing and other intervening factors, the Court issued its final decree enforcing in full the Board's Order with respect to Baker on November 27, 1968.

A controversy having arisen over the amount of backpay due under the terms of the Board Order and Court Decree, on September 30, 1969, the Board's Regional Director for the 20th Region issued a Backpay Specification and Notice of Hearing alleging, *inter alia*, that Golden State had not offered Baker reinstatement as required, that accordingly backpay continued to run, and calculating backpay for an interim period ending June 30, 1969. On November 25, 1969, Golden State filed its answer alleging, *inter alia*, that on December 11, 1968, Golden State had offered Baker reinstatement to employment substantially equivalent to that which he would have had if he had not been terminated. On December 19, 1969, the Regional Director, having during November, 1969 ascertained for the first time that on or about January 31, 1968 Golden State had sold its bottling business to All American Beverages, Inc. (formerly known as Sam Snead All American Golf, Inc.) thereafter d/b/a Pepsi

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[3] *N.L.R.B. v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

Cola Bottling Company of Sacramento, withdrew his previously issued Backpay Specification and issued a Supplemental Backpay Specification and Notice of Hearing.

Said Supplemental Backpay Specification alleged, *inter alia,* that All American Beverages, Inc. (hereinafter called All American), constituted a successor to Golden State within the meaning of the Board's Order and accordingly was also liable for Baker's reinstatement and backpay, that Baker had not been offered reinstatement to his former or substantially equivalent position by either Golden State or All American, and contained a corresponding interim calculation of backpay from the date of discrimination through June 30, 1969. The answer dated January 16, 1970 of Golden State and All American (hereinafter collectively called Respondents), verified for Golden State by the same officer as its previous answer, admitted the sale of the bottling business by Golden State to All American on January 31, 1968, denied that All American was a "successor" to Golden State in any manner liable for Baker's reinstatement or backpay, and, contrary to Golden State's original answer, denied any liability for backpay or reinstatement after January 31, 1968 because of the sale on that date to All American. Respondents' answer did not allege, alternatively or otherwise, that either Respondent had offered Baker reinstatement on December 11, 1968 or at any other time. Respondents' answer also denied that Baker would have been offered a distributorship or/compensated as such on a commission basis, as alleged in the Supplemental Backpay Specification. Both answers challenged the method of backpay computation employed by the General Counsel in the Specifications.

Hearings were held on February 3 and 4, 1970. At the opening of the hearing the General Counsel's unopposed motion to amend the Supplemental Backpay Specification by substituting the Exhibit A attached to Respondents' answer for Appendix A of the Specification through the third quarter of 1964, and substituting General Counsel's proffered exhibits 2, 3, 4, 24 and 25 for Appendices B, C-1, E-1, C-2 and E-2 of the Specification, respectively, with corresponding corrections in the monetary totals set forth in the Specification, was granted. All parties were represented by counsel and afforded all rights of due process. The General Counsel and Respondents filed briefs. The motions of the General Counsel and Respondents to correct the official transcript of the proceeding are granted, as set forth in Appendix A attached hereto. Upon the entire record in the case and from my observation of the witnesses, I make the following findings, conclusions and recommendations:

A. *The Issues*

The issues as framed by the Supplemental Backpay Specification and Respondents' answer thereto are (1) whether All American is a successor to Golden State, with prior knowledge of the pendency of this unfair labor practice proceeding, liable for Baker's reinstatement and jointly and severally liable with Golden State for Baker's backpay; (2) whether on or about October 1, 1964 Golden State would have offered, and Baker would have accepted, a distributorship, under which he would have been converted by contract from a driver-salesman to a distributor, or independent contractor, with earnings or income based upon net profits from sales, characterized in the Specification as commissions, as distinguished from the base pay and commissions

paid driver-salesmen, and, accordingly, was entitled to an offer of "reinstatement" as a distributor rather than as a driver-salesman; (3) whether, assuming Baker would have been offered and would have accepted a distributorship, his gross backpay should be computed upon the net profits of a comparable distributor, as alleged in the Specification, or upon Baker's estimated case sales as a distributor, computed by multiplying his former ratio of sales as a driver-salesman by the average case sales of all driver-salesmen and distributors during the relevant period, and in turn multiplying such estimate by the average net profit per case of the five top distributors during 1968, as alleged in the answer; and (4) whether, although not alleged in Respondents' answer to the Supplemental Specification, on December 11, 1968 All American offered Baker reinstatement or employment which was substantially equivalent to what he would have had if he had not been discriminatorily discharged, as required by the Board's Order.

B. *Background Facts*

As hereinabove found, on June 10, 1964 the Board ordered Golden State to reinstate Baker and make him whole for any loss of earnings, and the Court of Appeals affirmed this Order on December 2, 1965. Edwin J. Crofoot was president of Golden State, and he and his son, Edwin J. Crofoot II, vice president, owned all of its stock. Golden State owned other assets and business properties in addition to its bottling company, which it operated as Pepsi Cola Bottling Company of Sacramento under a franchise from the Pepsi Cola Company. Eugene Schilling was the general manager of the Bottling Company and also the secretary of Golden State, although not a stockholder. As the gen-

eral manager he was in charge of and managed the day-to-day operations of the Bottling Company, was a major participant in the previously found unfair labor practices and was the official who discharged Baker in violation of the Act. On January 31, 1968, unknown to the Board, the Court or Morton B. Jackson, counsel for Golden State in the prior proceeding and counsel for both Golden State and All American in this present proceeding, Golden State sold and transferred the Bottling Company as a going concern to All American, who thereafter operated it as a division doing business as the Pepsi Cola Bottling Company of Sacramento. Schilling thereupon became the general manager and "president" of the division of All American operating the Bottling Company, performing substantially the same function of running the plant as he had for Golden State. The meaning of the title president is not clear inasmuch as the record establishes that Schilling was not an officer or stockholder of All American.

On November 14, 1968, more than 9 months after the sale and transfer of assets, Schilling, who was no longer connected with or authorized to represent Golden State, sent the Court of Appeals a substitution of attorneys in the instant case signed by him as general manager of Golden State. On November 27, 1968, the Court issued its Final Decree enforcing the Board's Order with respect to Baker. Shortly after the Court's Decree, the Regional Director by letter requested Golden State to post the notice to employees and offer Baker reinstatement as required by the Decree. On December 11, 1968, Schilling posted such notice, which he signed as "president of Golden State," and sent the Board a certificate of such posting signed by him as "president of Golden State." The same day on a letter-

head entitled "Pepsi Cola Bottling Company, Sacramento," Schilling sent Baker a letter offering him reinstatement to his former position as a route driver, again signing this as president, with copies to Jackson and the Board. Because Baker and the Regional Director believed that Baker was entitled to a reinstatement as a distributor, as considered fully hereinafter, Baker did not accept this offer. On January 22, 1969, Schilling sent the Regional Officer certain payroll information on behalf of Golden State, again signing as president of the company. During February and March of 1969 the Regional Officer corresponded with Jackson and met with Schilling concerning the computation of backpay due Baker by Golden State. Neither Jackson nor the Board knew of the transfer of the Bottling Company to All American more than a year previously.

No agreement with respect to Baker's backpay having been reached and Schilling having instructed Jackson not to settle, on September 30, 1969, the Regional Director issued the original Backpay Specification. On or before November 18, 1969 Jackson advised the Regional Office for the first time that Golden State had sold and transferred its business to All American in 1968. Nevertheless, on November 19 Jackson signed an answer to the Backpay Specification on behalf of "Golden State doing business as Pepsi Cola Bottling Company of Sacramento," also alleging that Golden State so doing business had on December 11, 1968 offered reinstatement to Baker, which answer Crofoot verified as president of Golden State "doing business as Pepsi Cola Bottling Company" before a notary public on November 24, 1969, and which was filed with the Regional Office on November 25. Thereafter the Regional Director withdrew the previous Backpay Specification and issued

a Supplemental Backpay Specification and Notice of Hearing, alleging that All American was a successor to Golden State as a result of the transfer and sale of the assets in 1968, and had knowledge of the pending unfair labor practice proceedings before the transfer. On January 16, 1970 Jackson signed an answer to the Supplemental Backpay Specification on behalf of both Golden State and All American, which answer was verified on January 15, 1970 by Schilling as manager of the Pepsi Cola Bottling Company of Sacramento, a division of All American, and by Crofoot as president of Golden State, but not doing business as the Pepsi Cola Bottling Company of Sacramento. Respondents' answer alleged that neither Respondent was liable for Baker's reinstatement and backpay after January 31, 1968 because of the bona fide sale and transfer by Golden State to All American on that date. The answer did not allege that either Respondent offered Baker reinstatement, but Respondents' brief contends that the letter sent by Schilling to Baker on December 11, 1968 constituted an offer of reinstatement, without identifying by whom.

C. *The Liability of All American as a Successor*

The record establishes and there is no dispute that All American was a bona fide purchaser for value unconnected with Golden State, in no sense an *alter ego* or participant in any plan or device to evade the Board's Order. Despite the pleadings, there was no substantial dispute and the record establishes that All American was a successor employer within the meaning of the Act. The well-established applicable criterion is whether or not the "employing industry" remains substantially the same. The transferred business was contined substantial-

ly unchanged without interruption, the only variance being that the three top corporate officers of Golden State, two of whom owned all of its stock, no longer continued with the operation in such capacity, although each agreed not to compete and to remain as a consultant for 10 years for a substantial consideration set forth in the sale contract. Schilling, who was the secretary of Golden State and general manager of the bottling company, became general manager and "president" of the bottling company, a division of All American, but not an officer of All American. All of the other managerial and supervisory personnel continued with All American. All but two or three of the approximately 50 employees were transferred to and retained by All American. All of the 12 distributors who handled the products under contract continued with All American. The product remained the same, the customers remained the same and there was no cessation or change in the method of operation of the plant. Thus the record establishes and I find that the employing industry remained substantially unchanged and that All American was a successor within the meaning of the Act.

It has long been established that such a successor is required to bargain with the labor organization which represents the employees of the predecessor, and the Board has recently held that such a successor is required to honor the collective-bargaining contract entered into between its predecessor and a labor organization.[4] With respect to the liability of such a successor for a predecessor's unfair labor practices, particularly for reinstatement and backpay of discriminatees, it is

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[4] *William J. Burns Detective Agency, Inc.*, 182 NLRB No. 50 (1970).

now established that such a successor, who acquires with knowledge of the pendency of unfair labor practice proceedings against the precedessor, is liable for reinstatement and jointly and severally liable with its predecessor for backpay.[5] Respondents incorrectly contend, based upon earlier decisions[6] of the Board since expressly overruled by it,[7] that a bona fide purchaser for value, despite knowledge by it, a successor, of the pendency of unfair labor practice proceedings against the seller, is not liable and that the sale terminates all liability of both for reinstatement and backpay thereafter.

In *Perma Vinyl, supra,* involving a bona fide purchaser for value with knowledge of the pendency of unfair labor practice proceedings against the seller, the Board, reversing *Symns Grocer Co., supra,* and in reliance upon the teachings of the Supreme Court in *Wiley,*[8] held that "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct." The Board noted that "the imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor prac-

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[5]*Perma Vinyl Corporation,* 164 NLRB 968 (1967), enf'd *sub nom. U.S. Pipe and Foundry Co. v. N.L.R.B.,* 398 F.2d 544 (5th Cir. 1968).

[6]E.g., *Symns Grocer Co.,* 109 NLRB 346 (1954); and *M. Eskin & Son,* 148 NLRB 1022 (1964).

[7]Note 5, *supra.*

[8]*John Wiley & Son, Inc. v. Livingston,* 376 U.S. 543 (1964).

tices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices."[9] The Board further stated: "If the unfair labor practice has been the discriminatory discharge of employees, this responsibility should include the reinstatement of the discriminatees *without loss of pay*." (Emphasis added.)

Because that decision constituted a reversal of its prior position, the Board did not hold the successor liable for backpay inasmuch as that would have constituted a retroactive application thereof, but did hold the successor liable for reinstatement. However, the Board made clear that in all future cases such successors would be held jointly and severally liable with the predecessor for backpay. With respect to the predecessor, the perpetrator of the unfair labor practices, the Board held that "it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the dischargees for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer . . . . the offending employer and his successor share a joint and several responsiblity in the matter of back-

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[9]As found herein, Golden State through Crofoot agreed to indemnify All American for any monetary losses as a result of this proceeding.

pay." The Court of Appeals affirmed the Board's Order requiring reinstatement by the successor.[10] The Court, while expressing some reservations in a footnote with regard to the Board's holding with respect to backpay, specifically did not pass upon the liability of a successor for backpay because such was not involved in the case, stating that such "backpay question remains for another day."

The Board has subsequently made clear that it did not intend in *Perma Vinyl* to require successors to remedy all of the unfair labor practices of their predecessors, e.g., the posting of cease and desist notices concerning unfair labor practices engaged in by the predecessor, but that in cases of discriminatory discharge a successor with knowledge is liable for reinstatement and jointly and severally with the predecessor liable for backpay.[11] Because of the special circumstances present therein, i.e., the fact that the successor employed only 90 of the 120-130 employees of the predecessor, making it impossible to determine whether the discriminatees would have been among those immediately offered employment by the successor, the Board did not hold the successor liable for backpay, but only for subsequent reinstatement and backpay thereafter. However, the Board made clear that, absent such special circumstances, the rule enunciated in *Perma Vinyl* with respect to the liability of a successor with knowledge for reinstatement and backpay remained unchanged. I conclude and find that All American, as a successor to Golden State with knowledge of the pendency of the unfair labor practice proceedings against it, is liable for the reinstatement of Baker and jointly and severally liable with Golden State for backpay.

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[10]Note 5, *supra.*

[11]*Thomas Engine Corporation,* 179 NLRB No. 165 (1969).

Unlike the issue of successorship, i.e. the continuity of the employing industry, the issue of knowledge by All American prior to the purchase of the pending unfair labor practice proceedings against Golden State was very much in dispute and strenuously litigated, All American contending that it had no knowledge of the unfair labor practice proceedings pending against Golden State, including the Order of the Board and the decision of the Court. However, none of the officers or officials of All American were called to support this contention. According to Schilling, who was completely familiar with the unfair labor practice proceedings both before and after the transfer and in fact handled them for Golden State as its representative on the Board of the Sacramento Bottlers' Association, he did not participate in the negotiations of the sale to All American and did not convey his knowledge to All American prior to the transfer. Of course, after the transfer his knowledge, as president and general manager of All American's division operating Pepsi Cola Bottling Company of Sacramento, was imputable to his superiors in All American. According to Crofoot, he handled all of the negotiations for the transfer with the representatives of All American and, although specifically asked, did not advise them of the pending unfair labor practice proceedings allegedly because he had no knowledge whatsoever thereof.

Unless otherwise corroborated or undisputed, I do not credit the testimony of either Schilling or Crofoot. Their willingness to sign letters and execute documents containing either false or misleading statements concealing or failing to disclose the sale of the Bottling Company to All American, including Schilling's execution of a letter and substitution of attorneys to the Court of

Appeals as "general manager of Golden State Bottling Company" more than 9 months after the termination of his connection with Golden State, his execution of a formal notice to employees, a certificate of posting thereof with delivery to the Board and an offer of reinstatement to Baker, as "president of Golden State doing business as Pepsi Cola Bottling Company of Sacramento" more than 10 months after his connection with Golden State ceased, Crofoot's verification on November 24, 1969 of an answer to the original Specification as "president of Golden State doing business as the Pepsi Cola Bottling Company of Sacramento" more than 21 months after Golden State had ceased doing business as such, including an allegation that on December 11, 1968 Golden State had offered Baker reinstatement to his former position, more than 10 months after Golden State had ceased doing business as the Pepsi Cola Bottling Company, as well as the subsequent execution by both of the answer on January 15, 1970 contrary to their prior positions, casts considerable doubt upon their reliability as witnesses. In addition, Crofoot and Schilling contradicted each other in several material respects.

Crofoot testified that he alone handled the negotiations, for the sale with All American, that Schilling did not participate, and that Crofoot had no recollection whatsoever of the pending unfair labor practice case, although the Board had decided the case in 1964, the Court had affirmed in 1965, and the case represented a potential substantial monetary liability. Crofoot further testified that, although specifically asked by All American concerning pending litigation, he did not inform its representatives of the pending unfair labor practice case because he did not recall it. Crofoot

tried to bolster his position by contending that Schilling handled all of the labor relations matters through the Sacramento Bottling Association, yet Crofoot admitted that he consulted with Schilling on a day-to-day basis about all matters involving the plant, that Schilling was not allowed to settle or dispose of legal matters without Crofoot's approval, and that he had to approve all unusual and excessive expenditures, which included the substantial assessments paid by Golden State to the Bottling Association for legal fees in connection with the unfair labor practice proceedings.

The sale contract contained a representation and warranty by Golden State that there were no actions, suits or proceedings pending against Golden State. In addition, Crofoot subsequently orally agreed to indemnify All American against any losses arising as a result of this proceeding. Patently as a result of such contractual provisions and Crofoot's contention that he did not advise All American of the pending proceeding, Crofoot and Schilling testified that Schilling did not participate in the negotiations and was unfamiliar with the terms of the contract. Nevertheless, Schilling executed the contract as secretary of Golden State, which contained a condition that he continue in the employ of All American as general manager for a period of at least 1 year at a monthly salary of $1500. Schilling admitted participating in the first negotiating session between Golden State and All American, and meeting on another occasion with officials of All American concerning his continuing as general manager. After the transfer Schilling admittedly had no authority over legal proceedings for All American and had to consult his superiors for authorization of any unusual expenditures. He admitted that he would consider any action by him contrary to

such instructions a negligent undertaking of his duties. He also admitted that after the transfer he was not authorized in any manner to represent Golden State. Yet he offered Baker alleged reinstatement, handled all contacts with Golden State's attorney, made the decision not to settle the backpay proceeding, involving at that time a claim in excess of $19,000, sent a substitution of attorneys to the Court, and issued the notices required by the Court's Decree all in the name of Golden State and all allegedly without ever advising All American of the pendency of these proceedings until a few days before the commencement of the hearings herein.

Patently, absent an establishable admission, only Golden State and/or All American would have knowledge whether All American knew of the pending unfair labor practice proceedings against Golden State prior to the transfer. No officials of All American were called to testify or deny that All American had such knowledge, nor was their failure to testify explained, which warrants an inference that had such testimony been elicited it would have been unfavorable to Respondents' position. Under all of the circumstances, I do not credit the testimony of Crofoot and Schilling that neither advised All American of the pending unfair labor practice proceedings prior to the transfer and sale. Moreover, such testimony tends only to establish a negative, and casts no light on whether All American received such information from other sources, including other officials of Golden State. A preponderance of the reliable, probative and substantial evidence in the entire record convinces me, and I find, that All American was a successor employer with knowledge at or before the time of the transfer of the pending unfair labor practice pro-

ceedings against Golden State, and accordingly is liable for Baker's reinstatement and is jointly and severally liable with Golden State for Baker's backpay.

D. Whether Baker Is Entitled to Reinstatement as a Distributor

The record establishes that Baker, who was discriminatorily discharged August 16, 1963, was Golden State's leading or top driver-salesman during the 14 months of his employment. All of the parties agree upon the computation of his gross backpay until October 1, 1964, based upon the fixed wages paid driver-salesmen, plus a computation of his commissions determined by multiplying the average commissions for that period by Baker's ratio or percentage of the average case sales of all of the drivers during his employment. On October 1, 1964, Respondent began converting its driver-salesmen to distributors, or independent contractors, by offering each of them, particularly those with the best sales records, contracts as distributors, or independent contractors, under the terms of which they realized net profits, after the deduction of their operating expenses, from the purchase of the products from Golden State and the resale to customers, as distinguished from the salary and commission previously paid them as driver-salesmen. In general, Golden State sold the distributors Pepsi Cola at a discount of 30 cents a case from the price at which they resold to the customers. Under this program Respondent enlarged the previous routes of the salesman by the addition of several high-volume stops, so that as distributors they could expect to realize greater net profits than their previous earnings as driver-salesmen, with the additional objective of an added incentive to increase their overall sales in order to increase their net income.

On October 1, 1964 Respondent selected Donald Thorne, who was then its best driver-salesman and had been third while Baker was employed, as the first driver-salesman to become a distributor. After a short period of experimentation with Thorne, at a meeting in early October, 1964 Schilling announced to the rest of the driver-salesmen Golden State's planned program of distributorships, advising them that each could convert to a distributorship if he wished and if not could remain as driver-salesman, that the distributor's routes would be somewhat expanded by the addition of several high-volume stops, that as distributors they could expect to earn more money than they had as driver-salesmen, and that each would have first refusal of his then route. Schilling informed the men that the larger volume routes would gradually be converted to distributorships and those who desired to remain driver-salesmen would be assigned low-volume city routes. Schilling invited each of the drivers to consult him after the meeting with respect to whether or not each wished to enter into a contract as a distributor under the proposal. During October three drivers in addition to Thorne were converted to distributors, two more during November, 1964, and two more in January, 1965. The second driver to become a distributor in October was Leonard Willeford, who had been assigned Baker's route after his discharge. The record establishes that Willeford was not as well qualified a driver-salesman as Baker. Substantially all of the driver-salesmen who became distributors retained the same routes, with several stops added to bolster volume.

Schilling, in an attempt to bolster Respondents' contention that Baker would not have been offered a distributorship, testified that Golden State did not offer all

of the driver-salesmen distributorships, but the driver-salesmen called as witnesses, whom I credit, testified, and I find, that Golden State offered all of the driver-salesmen an opportunity to convert to distributors if they so desired. Golden State was particularly interested in converting its large-volume routes and top driver-salesmen, of which Baker was number one while employed, to distributors. Golden State ultimately increased the number of its distributors to 12 before the sale to All American. All 12 assigned their contracts to All American and were continued by it as distributors. Schilling, whom I do not credit, testified that he would not have offered Baker a distributorship because he required constant supervision and thus could not have operated independently. Schilling's testimony with respect to Baker's qualifications contains several contradictions and evasions, and it must be recalled that it was Schilling who discriminatorily discharged Baker in 1963. Only one week before Baker's discharge Schilling had informed him that he was a good employee doing a good job. Schilling also told Willeford that Baker had done a good job. Golden State's own records establish that Baker was its top driver-salesmen. Quite clearly the same qualities which made Baker Golden State's top driver-salesman would have been enhanced by the added incentive of increased profits as a result of conversion to a distributor. The record establishes, and I find, that Baker, if he had not been discriminatorily discharged, would have been the first driver-salesman offered a distributorship instead of Thorne, who succeeded Baker as Golden State's number one driver-salesman. In addition, Willeford, who succeeded Baker on his route and was not as good a driver-salesman as Baker, was the second employee given a distributor-

ship, in early October, 1964. Baker testified, and it was undisputed, that he would have then accepted, and would now accept, a distributorship if offered.

Respondents contend that because their distributors are independent contractors, not employees, Baker is not entitled to reinstatement as a distributor under the Board's Order, but only to the job of a driver-salesman which he held at the time of his discharge. Respondents fail to distinguish the Board's remedial powers from protection of employees under the Act. As the General Counsel concedes, if Baker had been "discharged" while an independent contractor, clearly such discharge would not fall within the purview of the Act. However, it is well settled that employees who are unlawfully discharged are entitled to whatever promotions, increments and other benefits they would have received absent such unlawful discrimination, and that the Board is empowered to make such employees whole by ordering their "reinstatement" to that which they would have had but for the unlawful discrimination.[13]

The General Counsel also contends that Respondents' distributors were not in fact independent contractors, basing his argument upon the well established degree or right of control test. However, it is unnecessary to resolve this factually involved issue inasmuch as it is well established that the Board's remedial powers include authority to require a discriminatee's reinstatement to that which he would have had but for the dis-

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[13] *International Union of Operating Engineers, Local 925 (J.L. Manta Inc., et al.)*, 180 NLRB No. 117 (1970); *Mooney Aircraft, Inc.*, 156 NLRB 326, enf'd 375 F.2d 402 (5th Cir. 1967); *Gainsville Publishing Company*, 150 NLRB 602 (1964); and *East Texas Steel Casting Company, Inc.*, 116 NLRB 1336, enf'd 255 F.2d 284 (5th Cir. 1958).

crimination. I am satisfied and find that under the Board's Order Baker is entitled to "reinstatement" as a distributor, an improved position which he would have had but for Golden State's discrimination against him.

E. *Method of Backpay Computation*

It has been found that but for his discharge Baker would have become a distributor on October 1, 1964. The parties are in agreement with respect to the computation of Baker's gross backpay until that date. The General Counsel contends that the most accurate and appropriate method available to compute Baker's gross backpay as a distributor after October 1, 1964 is by the use of the net profits, or earnings, of Thorne, the distributor most comparable to Baker. As found above, during Baker's employment he was the top salesman and Thorne ranked third. During the 14 months from July, 1962 through August, 1963, the records of case sales in evidence show that in monthly sales Baker ranked first four times, second five times and third five times, whereas Thorne's rankings varied from first to tenth. In overall sales Baker ranked first and Thorne third. If anything, as the General Counsel points out, the use of Thorne's net profits as the basis for computing Baker's gross backpay is more of a detriment to Baker than to Respondents, inasmuch as during Baker's tenure the ratio of his case sales to that of the average exceeded Thorne's ratio.

Respondents, assuming but not conceding that Baker would have become a distributor, contend that his gross backpay should be computed by multiplying the ratio of his sales while employed to the average (as to which the parties are in agreement), by the average case sales of all of the salesmen and distributors during the relevant period, to determine his estimated case sales as a

distributor, and in turn multiplying that by the average net profit per case of the five top distributors during 1968. Coincidentally or otherwise, the average net profit of the five top distributors during 1968 was substantially less than such average during 1965, 1966 or 1967. Because of Respondents' contention that the sale of the bottling business to All American terminated all liability of both Respondents for reinstatement and backpay, Respondents' alternative computations did not proceed beyond January 31, 1968, the date of the sale.

It is well established that the use of a comparable employee's earnings as a basis for computing a discriminatee's gross backpay is appropriate, particularly where it demonstrably results in no monetary detriment to a respondent. Here the use of Thorne's net profits as the distributor most nearly comparable to Baker results in a built-in bias in favor of Respondents because of Baker's undisputed superior sales record. The record establishes, as computed by Respondents and subsequently accepted by the General Counsel, that the ratio of Baker's case sales while employed to the mean case sales per man was 125.6 percent. An independent computation by me from the figures available in the record reveals that Thorne's ratio to the mean for the same period of time was 117.1 percent. Respondents' computation of Baker's estimated case sales, plus calendar 1968 which was computed by me because of Respondents' failure to do so, both based upon the average case sales per quarter for the relevant period multiplied by Baker's established ratio, result in estimated case sales by Baker substantially below those made by Thorne during the same relevant period, with the exception of 1966 and 1967. In addition, Respondents use of the average net profit per case of the five top

distributors for the year 1968, substantially the lowest of the 4 years involved, caused an even greater disparity in Baker's estimated profits vis-a-vis Thorne's net profits.[13]

Respondents suggest no reason why Baker's estimated gross backpay should be based upon the average of all case sales by driver-salesmen and distributors, increased by Baker's prior ratio, multiplied by the average net profit of the top five distributors during 1968, instead of the sales and net profits of Thorne, admittedly the top salesman and distributor after Baker's discharge. As noted above, even the use of Thorne's net profits to calculate Baker's gross backpay results in some bias in favor of Respondents, and the use of their formula would substantially increase such distortion in their favor. I am satisfied and find that the use of Thorne's net profits as a method of calculating Baker's gross backpay after October 1, 1964 was both appropriate and reasonable, and the most accurate method available short of involved calculations to eliminate the slight bias favoring Respondents.[14]

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[13]The 1968 average net profit per case used by Respondents was $.1837. Independent calculations reveal that the average net profit per case of the top five distributors from 1965 through 1968 was $.2057, and that Thorne's average net profit per case for the same 4 years was $.2112. Other calculations reveal that, coincidentally, the average case sales for the top five distributors during the fourth quarter of 1964 and the same 4 years are substantially the same as the average of all case sales multiplied by Baker's established ratio, the formula employed by Respondents. Except for 1966 and 1967, they too are substantially below Thorne's case sales for the same period of time. The use of such estimated case sales plus the use of either lower average net profit per case would result in substantially lower gross backpay than that based upon Thorne's net profits.

[14]It could, for example, be argued that Thorne's net profits should be multiplied by 107.2 percent, Baker's prior ratio of sales expressed as a percentage of Thorne's prior ratio of sales.

F. *Respondents' Alleged Offer of Reinstatement*

Respondents' answer to the Supplemental Specification, prepared by the same attorney and verified by the same officer of Golden State as its original answer, did not allege that either Respondent had offered Baker reinstatement, unlike Golden State's answer to the original Specification, which alleged that it had offered Baker reinstatement to his former position on December 11, 1968. Despite the failure of Respondents' answer to so allege, Respondents contend in their brief that on December 11, 1968 Baker was offered reinstatement to his former position as a driver-salesman. Respondents' brief refrains from indicating whether such offer was made by Golden State or All American. As hereinabove found, pursuant to the Court Decree and the subsequent request of the Regional Director, on December 11, 1968, Schilling posted the required notice and sent the Board a certificate of such posting, both signed by him as the "president of Golden State," and the same day, as also required by the Court Decree, sent Baker an offer of reinstatement to his former job as a route driver, again signing as "president" of the Pepsi Cola Bottling Company, with copies to Jackson and the Board. Schilling admitted, and it is undisputed, that his connection with Golden State had terminated more than 10 months previously, and that he had no authority whatsoever to represent Golden State thereafter.

The record establishes beyond dispute, Schilling admitted, and Respondents' brief in effect contends, that he made this "offer" on behalf of Golden State. Clearly such offer was *ultra vires*, void and a nullity. Not only

did Schilling have no such authority, but Golden State had no such job, having sold the bottling business on January 31, 1968. Schilling signed and sent to the Board all of the contemporary documents required by the Decree as the "president" of Golden State.[15]

Moreover, the General Counsel contends that such "offer" was not in compliance with the Board's Order, inasmuch as Baker was entitled to "reinstatement" as a distributor, the position which he would have had but for Golden State's discrimination, the "offer" was only for a job as driver-salesman, would not make Baker whole, and thus was invalid. I have found hereinabove that under the Board's Order Baker was entitled to "reinstatement" as a distributor, for the reasons there explicated. I conclude and find that Baker was never given a valid offer of reinstatement to the position which he would have had but for the discrimination, and accordingly that liability for backpay continues to run.

G. *Backpay Calculations*

As hereinabove found, there was no dispute with respect to the computation of Baker's gross backpay until October 1, 1964, when it has been found he would have become a distributor. The General Counsel substituted Respondents' Exhibit A for his Appendix A of the Specification and thus the parties agreed that the ratio of Baker's case sales to the overall mean was 125.6 percent, which ratio was used by all to compute the commissions Baker would have earned as a driver-

[15]If, on the other hand, it be contended that Schilling signed on behalf of All American, contrary to the facts and from which Respondents' brief refrains, the notice and letter constituted a public admission that All American would offer Baker full reinstatement and make him whole for any loss of pay.

salesman until October 1, 1964, the base pay of driver-salesmen being undisputed. General Counsel's Exhibit 2, received in substitution for Appendix B of the Specification, calculated Baker's quarterly gross backpay from August 24, 1963[16] through the third quarter of 1964 upon such basis, agreed to by Respondents with the correction of a minor error of $5 in the calculation of the first partial quarter, as the result of failing to prorate the allowance for uniforms for such partial quarter. Thus the parties agreed that Baker's total gross backpay as corrected for the period ending with the third quarter of 1964 was $7,208.

Beginning with the fourth quarter of 1964, it has been found that an appropriate method of projecting Baker's gross backpay consisted of Thorne's net profits, which are available in the record through 1968. Respondents' calculations after the third quarter of 1964 do not correspond with those of the General Counsel, because of their contention, heretofore considered and found without merit, that if Baker would have become a distributor his gross backpay should be computed upon the average case sales multiplied by his ratio of sales prior to his discharge. General Counsel's Exhibit 3, substituted for Appendix C-1 of the Specifications, calculates Baker's gross backpay from the fourth quarter of 1964 to and including the fourth quarter of 1968. With respect to the fourth quarter of 1964, Respondents stipulated that Thorne's net profits, set forth in General Counsel's Exhibit 3 as Baker's gross backpay for that period, were accurately derived from Thorne's federal tax returns, without conceding their position

[16]Because Baker, terminated August 16, 1963, was given 1 week's vacation pay.

with respect to the use of Thorne's net profits in calculating Baker's gross backpay. The accuracy of the calculations set forth in General Counsel's Exhibit 3 are not challenged or disputed and result in gross backpay total from the fourth quarter of 1964 through 1968 of $52,285.

Appendix D of the Specification calculates Baker's net interim earnings, i.e., his interim earnings less necessary expenses incurred in obtaining and retaining interim employment, from the third quarter of 1963 through the second quarter of 1969. The accuracy of such calculation is undisputed. General Counsel's Exhibit 4, received in substitution for Appendix E-1, calculates the resulting net backpay from the third quarter of 1963 through 1968 by subtracting the net interim earnings from the gross backpay, resulting in a net backpay total of $16,497 (with the correction of the minor error in the calculation of gross backpay for the third quarter of 1963). The accuracy of these calculations is not challenged. Because of the unavailability at the time of the hearing of Thorne's net profits for calendar 1969, the Supplemental Specification estimated Thorne's net profits for the first two quarters of 1969 in order to estimate Baker's gross and net backpay for the same period of time, his net interim earnings being available in Appendix D. Inasmuch as it has been found above that Baker has not been offered reinstatement as required by the Board's Order, and that backpay continues to run until such offer has been made, it will be necessary hereafter to calculate Baker's net backpay for all of 1969 and whatever subsequent period in 1970 and thereafter may run until Respondents comply with the Board's Order.

Accordingly it would appear unnecessary and inappropriate at this time to base Baker's gross and net bakpay for the first two quarters of 1969 upon estimates derived from averaging Thorne's net profits for the corresponding quarters of 1965 through 1968. The calculations so estimating Baker's gross and net backpay are set forth in General Counsel's Exhibit 24 and 25, received in substitution for Appendixes C-1 and E-2. Admittedly they result in an estimate. Inasmuch as it will be necessary hereafter to calculate backpay until Baker is offered reinstatement, I find it appropriate to defer such calculations until Thorne's actual net profits are available, and accordingly terminate the calculation of interim backpay herein with the last quarter of 1968.

The following tabulation summarizes the above calculations:

Calendar Quarter	Gross Backpay	Net Interim Earnings	Net Backpay
1963-3	673	659	14
1963-4	1602	1630	-
1964-1	1582	1526	56
1964-2	1629	1619	10
1964-3	1722	1635	87
1964-4	2700	2101	599
1965-1	2412	1586	826
1965-2	2927	1621	1306
1965-3	3269	2056	1213
1965-4	2824	2096	728
1966-1	2838	1660	1178
1966-2	3201	1800	1401
1966-3	3359	2388	971
1966-4	2728	2280	448
1967-1	2708	1755	953
1967-2	3027	2015	1012
1967-3	3406	2087	1319
1967-4	2685	2512	173
1968-1	3081	2080	1001
1968-2	3891	2450	1441
1968-3	4076	2551	1525
1968-4	3153	2917	236
		Total Net Backpay	16,497

H. *Conclusions and Recommendations*

It is concluded and found that the net amount of backpay due to Baker for the period from the date of his discharge, August 16, 1963, to December 31, 1968, is $16,497, plus interest at the rate of 6 percent per annum on each quarterly amount as provided in the Board Order and Court Decree, less any tax withholding required by law, plus such further amounts of backpay as have or may hereafter accrue from January 1, 1969 to the date of a valid offer of reinstatement to Baker by All American.[17]

Upon the basis of the foregoing findings and conclusions and upon the entire record in this case, I recommend that the Board issue the following:

ORDER

Respondent Golden State Bottling Company,, Inc. and Respondent All American Beverages, Inc., d/b/a Pepsi Cola Bottling Company of Sacramento, and their officers, agents, successors and assigns, shall jointly or severally pay to Kenneth L. Baker the sum of $16,497, with interest at the rate of 6 percent per annum computed on the basis of the quarterly amounts of net backpay due, less any tax withholding required by law, as net backpay due under the Board Order and Court Decree for the period ending December 31, 1968, plus an undetermined amount of backpay from January 1, 1969 to the date of a valid offer of reinstatement to Baker, plus interest at the rate of 6 percent per annum computed in the manner provided herein, less any tax withholding required by law.

Dated: July 13, 1970.

/s/ Robert L. Piper
Robert L. Piper
Trial Examiner

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[17] *Tennessee Packers, Inc.*, 152 NLRB 1315 (1965).

APPENDIX A

Page	Line	Correction
Title Page	21	Change "Kumbler" to "Kumler"
2	4	Change "Krofoot" to "Crofoot"
12	19	Change "Appendix D" to "Appendix B"
18	2 and 11	Change "$16,528" to "$16,502"
21	2	Change "or each driver sales" to "for each driver-salesman"
24	17	Change "there will probably be" to "these would properly be"
30	19	Change "C's in" to "C's as in"
35	6	Change "violation" to "no violation"
35	8	Change "relevant" to "not relevant"
36	6	Change "bagging" to "begging"
44	15	Change "Krofoot" to "Crofoot"
45	7	Change "Krofoot" to "Crofoot"
53	7	Change "Krofoot" to "Crofoot"
54	24	Change "Krofoot" to "Crofoot"
57	10 and 23	Change "Krofoot" to "Crofoot"
58	9	Change "Krofoot" to "Crofoot"
67	12	Change "inquire" to "acquire"
88	4	Change "as" to "and"
88	13	Change "receive" to "proceed"
88	16	Change "resident" to "President"
90	6, 7 and 8	Change "vote" to "boat"
101	2	Change "released" to "replaced"
105	24	Change "displays" to "space"
111	23	Change "Kumbler" to "Kumler"
121	5	Change "Ralle's group" to "Mraule's route"
121	9	Change "Ralle R-a-l-l-e" to "Mraule M-r-a-u-l-e"

Page	Line	Correction
121	10	Change "Ralle" to "Mraule"
130	12	Change "that I answered" to "in answer to"
143	7	Change "Hodse and Kumbler" to "Hodge and Kumler"
154	10	Change "James" to "Gene"
157	17	Change "in the corporation" to "of incorporation"
160	2	Change "dispursement" to "disbursement"
161	24	Change "hndle" to "handle"
180	12	Change "September" to "December"
182	12 and 22	Change "Jackson" to "Barton"
191	11	Change "rules" to "route"
196	4	Change "11" to "1100"
200	13	Change "group" to "route"
209	10	Change "private" to "pilot"
211	6	Change "Can you tell me" to "Did you tell him"
213	17	Change "euql" to "equal"
223	23	Change "seek" to "week"
228	3	Change "dreived" to "derived"
234	3	Change "Why?" to "How?"
243	21	Change "Apendic" to "Appendix"
254	14	Change "accounts" to "accountants"
260	2	Change "with" to "wit"

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1290.

All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1324.

On Petition for Review and Cross-Applications for Enforcement of a Supplemental Order of the National Labor Relations Board.

Before: CHAMBERS, BROWNING, and KILKENNY, Circuit Judges PER CURIAM:

Golden State owned and operated the Pepsi-Cola Bottling Company of Sacramento. In 1964 the Board found that in the preceding year Golden State had violated sections 8(a)(3) and (1) of the Act by discriminatorily discharging one of its employees, Kenneth L. Baker, a driver-salesman. The Board ordered Golden State to offer Baker reinstatement and make him whole for any loss of earnings from the date of discharge to the date of reinstatement. We upheld the Board's order. *NLRB v. Golden State Bottling Co.*, 353 F.2d 667 (9th Cir. 1965). In 1968, with the controversy not yet resolved by compliance with the order, Golden State sold Pepsi-Cola Bottling to All American. In 1969 the Board issued a supplemental order imposing liability upon both Golden State and All American for

back pay found to be due Baker for periods before and after the 1968 sale. Both companies challenge the order; the Board seeks enforcement.

1. All American argues that it is not liable for back pay accruing before or after the acquisition. We disagree. Pepsi of Sacramento was a self-contained, going operation. No change was made in either managerial or supervisory personnel as a result of the sale. All but two or three of the approximately 50 employees of Pepsi were retained under All American's ownership. All of the 12 distributors who handled the products under contract continued with All American. The product remained the same, the customers remained the same, and there was no cessation or change in the method of operation of the plant. The chief executive of the Pepsi operation, Eugene B. Schilling, held the same post before and after the sale. This and other evidence offered substantial support for the Board's finding that All American purchased Pepsi with knowledge of the unfair labor practice litigation. On this record it was proper for the Board to hold All American responsible for remedying violations of the Act committed by its predecessor. *United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. v. NLRB*, 442 F.2d 1180, 1183 (9th Cir. 1971); *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enforced sub nom. United States Pipe & Foundry v. NLRB*, 398 F.2d 544 (5th Cir. 1968). *See generally*, Du Ross, Protecting Employee Remedial Rights under the Perma Vinyl Doctrine, 39 Geo. Wash. L. Rev. 1063 (1971).

2. We do not consider whether the Board properly held Golden State liable for post-acquisition lost wages.

Golden State agreed to indemnify All American for any liability imposed upon All American for back pay, and we have upheld the Board's imposition of such liability upon All American for the post-acquisition period. Accordingly, Golden State concedes that it is liable for such wages by virtue of its agreement, whether or not it would also be liable absent that agreement.

3. Pepsi converted most of its driver positions to distributorships in October 1964. Petitioners argue that this change ended their liability to Baker because distributors are "independent contractors" excluded from the coverage of the Act by 29 U.S.C. § 152(3). However, it is undisputed that when Baker was discriminatorily discharged he was an ordinary employee. The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236-37 (2d Cir. 1953).

4. The offer to reinstate Baker as a driver-salesman did not end liability for back pay. The Board found upon ample evidence that Baker would have become a distributor but for his unlawful discharge. According to petitioners' own testimony, a distributorship would have involved more income. It was therefore not sufficient to offer Baker reinstatement as a driver-salesman. That position would have been "non-equivalent employment the acceptance of which would have deprived [Baker] of the very [right that was] violated by the em-

ployer." *Bon Hennings Logging Co. v. NLRB*, 308 F.2d 548, 557 (9th Cir. 1962).

5. Having found that the unlawfully discharged employee was Pepsi's most successful driver-salesman before termination, and that he would have been given a distributorship but for the discriminatory discharge, it was proper for the Board to conclude that the goal of complete compensation would be most nearly achieved by computing Baker's losses on the basis of the profits of the most successful distributor. As we recently said, "The Board has wide discretion in selecting criteria for reconstructing what would have happened in a given case but for the discrimination." *NLRB v. Superior Roofing Co.*, ... F.2d ..... (9th Cir. May 4, 1972).

We have examined petitioners' other objections to the method of computation and the use of profits in determining the amount of the award. The Board's decision "can fairly be said to effectuate the policies of the Act," *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), and is certainly not "arbitrary or unreasonable in the circumstances involved." *NLRB v. Brown & Root*, 311 F.2d 447, 452 (8th Cir. 1963).

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento v. National Labor Relations Board, No. 71-1290. All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento v. National Labor Relations Board, No. 71-1324.

KILKENNY, Dissenting:

I would not extend the *Perma Vinyl* doctrine to apply to the facts on the record before us. *NLRB v. Burns Security Services,* ..... U.S. ..... (May 15, 1972) and *Brown v. NLRB,* ..... F.2d ..... (CA9, June 12, 1972), in my opinion, are applicable to our facts and require us to deny enforcement of the Board's supplemental order.

APPENDIX C.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1290.

All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1324.

Before: CHAMBERS, BROWNING, and KILKENNY, Circuit Judges.

THIS CUASE came on to be heard upon petitions for review, and on cross-applications for enforcement of, a supplemental order of the National Labor Relations Board issued on January 21, 1971, against Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, and All American Beverages, Inc. d/b/a Pepsi-Cola Bottling Co. of Sacramento, their officers, agents, successors, and assigns. The Court heard argument of respective counsel on June 13, 1972, and has considered the briefs and transcript of record filed in this cause. On August 21, 1972, the Court being fully advised in the premises, handed down its decision denying the petitions for review and granting enforcement of the Board's supplemental order. In conformity therewith, it is hereby

ORDERED AND JUDGED by the Court that:

Petitioner Golden State Bottling Company, Inc., and Petitioner All American Beverages, Inc., d/b/a Pepsi Cola Bottling Company of Sacramento, and their officers, agents, successors and assigns, shall jointly or severally pay to Kenneth L. Baker "the sum of $16,497, with interest at the rate of 6 percent per annum computed on the basis of the quarterly amounts of net backpay due, less any tax withholding required by law, as net backpay due under the Board Order and Court Decree for the period ending December 31, 1968, plus an undetermined amount of backpay from January 1, 1969 to the date of a valid offer of reinstatement to Baker, plus interest at the rate of 6 percent per annum" computed in the manner provided in the Trial Examiner's Decision, less any tax withholding required by law.

Enforced, Judgment Filed and Entered
/s/ William B. Luck
William B. Luck
Clerk

A TRUE COPY,

ATTEST:
William B. Luck
Clerk

APPENDIX D.

Fifth Amendment to the United States Constitution.

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Labor Relations Act, as Amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151 Et Seq.):

"SECTION 1(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

"SECTION 2(3). The term 'employee' shall include any employee, and shall not be limited to the

employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

"SECTION 7. Employee shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

"SECTION 8. (a) (1) and (3) It shall be an unfair labor practice for an employer . . .

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization . . ."

"SECTION 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure

for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

"SECTION 10(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an

order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

"SECTION 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeal to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall file in the court the record in the proceedings, as provided in Section 2112 of title 28, United States Code . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if

application is made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of title 28.

"Section 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to be Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Federal Rules of Civil Procedure 65(d):

(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

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No. 72-702

In the Supreme Court of the United States

OCTOBER TERM, 1972

GOLDEN STATE BOTTLING COMPANY, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
A. Background	2
B. The present proceeding	3
Argument	6
Conclusion	12

CITATIONS

Cases:

Brown v. *National Labor Relations Board*, 462 F. 2d 699	11
Int'l Association of Machinists, District Lodge 94 v. *National Labor Relations Board*, 414 F. 2d 1135, certorari denied, 396 U.S. 889	10
John Wiley & Sons v. *Livingston*, 376 U.S. 543	7, 8, 11
National Labor Relations Board v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234	10, 11
National Labor Relations Board v. *Burns*, 406 U.S. 272	6, 7, 8, 11
National Labor Relations Board v. *Colten*, 105 F. 2d 179	7
National Labor Relations Board v. *Lunder Shoe Corp.*, 211 F. 2d 284	11
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344	11
Perma Vinyl Corp., 164 NLRB 968	5, 8, 10
Regal Knitwear Co. v. *National Labor Relations Board*, 324 U.S. 9	10

Cases—Continued

	Page
Textile Workers v. *Darlington Mfg. Co.*, 380 U.S. 265	9
U.S. Pipe & Foundry Co. v. *National Labor Relations Board*, 398 F. 2d 544	10
United Automobile Workers v. *National Labor Relations Board*, 442 F. 2d 1180	10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	7

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	2
Section 8(a)(1)	2
Section 8(a)(3)	2
Section 8(d)	8
Section 10(c)	8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32–36) is reported at 467 F. 2d 164. The decision and order of the National Labor Relations Board (Pet. App. 1–31) are reported at 187 NLRB No. 142.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37–38) was entered on August 21, 1972. The petition for a writ of certiorari was filed on November 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

402-343—73

QUESTIONS PRESENTED

1. Whether a successor employer who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the National Labor Relations Act may be required to remedy that unfair labor practice by reinstating the employee with backpay.

2. Whether the Board properly determined the amount of backpay due the unlawfully discharged employee.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 39–44.

STATEMENT

A. BACKGROUND

On June 10, 1964, the Board found that Golden State Bottling Co., Inc. (hereafter "Golden State" or "the predecessor"), violated Section 8(a)(3) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging Kenneth L. Baker, a driver-salesman, because of his prounion activities. The Board ordered Golden State and its officers, agents, successors, and assigns to offer Baker immediate and full reinstatement to his former or a substantially equivalent position and to make him whole for any loss of earnings from the date of his discharge to the date of his reinstatement. 147 NLRB 410. On December 2, 1965, the court below enforced

the Board's order with respect to Baker, 353 F. 2d 667.[1]

Several months after the Board's decision, Golden State decided to convert its driver-salesmen to distributors. On October 1, 1964, Golden State offered the first distributorship contract to Donald Thorne, who, in Baker's absence, was its best driver-salesman (R. 119; Tr. 115, 117, 209). By January 31, 1968, Golden State had converted 12 of its 18 salesmen to distributors (R. 119–120; Tr. 117–118, 121–122; GCX 18b). On that date, Golden State sold the Bottling Company and transferred all of its assets to All American Beverages, Inc. (hereafter "All American" or "the successor") as a going concern (R. 113, 115; Tr. 44–45, 77–79, 60–61; GCX 15a, 15b).[2]

B. THE PRESENT PROCEEDING

On September 30, 1969, the Board's Regional Director instituted proceedings to determine the amount of backpay due Baker. On December 19, 1969, the Director, having learned of the sale to All American, added the latter company to the proceeding on the theory that it was a successor to Golden State within the meaning of the Board's order. (Pet. App. 2–3.)

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[1] However, due to the court's delay in disposing of the Board's petition for rehearing on a portion of the court's decision wholly unrelated to Baker, a final decree was not entered until November 27, 1968 (R. 111–112).

"R." refers to the materials contained in Volume I Pleadings, "Tr." refers to the stenographic transcript of testimony, and "GCX" to the General Counsel's exhibits.

[2] The Board found that All American was a bona fide purchaser for value of the bottling company (Pet. App. 8).

Based upon the evidence adduced at this supplemental hearing, the Board, adopting the decision of the Trial Examiner, made the following findings and conclusions:

All American was a successor employer to Golden State, within the meaning of the Act (Pet. App. 8, 9), since All American, on and after January 31, 1968, had continued the business without cessation or hiatus, and without changing the method of operation or the plant (Pet. App. 8–9; Tr. 124–125, 135–136, 251, 274). All American hired all of the Golden State's supervisory and managerial personnel, as well as all but 2 or 3 of Golden State's 50 employees (Pet. App. 9; Tr. 100–101, GCX 16(b)). The 12 Golden State distributors assigned their contracts to All American and continued distributing the same bottling products to the same customers (Pet. App. 9; Tr. 95–100). Eugene Schilling, secretary of Golden State and general manager of the bottling operation, became the general manager and "president" of the Bottling Division of All American (Pet. App. 5–6; Tr. 170, 45, 86, 136–137).

The Board further found that All American had knowledge at or before the date of transfer of the underlying unfair labor practice proceeding involving Golden State (Pet. App. 16–17). The Board relied on the fact that none of the officials of All American appeared as witnesses during the hearing to deny knowledge, nor was their absence explained (Pet. App. 13, 16). Moreover, the Board, accepting the Trial Examiner's ruling, discredited the denials of

Schilling[3] and Golden State President Edwin Crofoot that they did not advise All American of the Board's unfair labor practice findings prior to the transfer (Pet. App. 13, 16).[4]

The Board followed its earlier decision in *Perma Vinyl Corp.*, 164 NLRB 968, where it held that, in the foregoing circumstances, a successor was responsible for remedying his predecessor's unlawful conduct (Pet. App. 10). It issued a supplemental order requiring Golden State and All American, jointly and severally, to pay Baker $16,497, with interest, as net backpay due for the period ending December 31, 1968, plus an undetermined amount of backpay from January 1, 1969, to the date a valid offer of reinstatement is made to Baker by All American (Pet. App. 29).

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[3] All American hired Schilling as its general manager on the date it took over from Golden State. While working for Golden State, Schilling had been responsible for the unlawful discharge of Baker. 147 NLRB at 418.

[4] The Examiner noted that Schilling and Crofoot had attempted to conceal the transfer to All American from both the Board and the court of appeals (Pet. App. 13–14). He further found that, while Crofoot testified that he had "forgotten" about the unfair labor practice case when asked by All American concerning pending litigation, Crofoot was responsible for settling all legal matters involving Golden State, and he had authorized the payment of substantial legal fees in connection with that case (Pet. App. 14–15; Tr. 46, 48). Finally, the Examiner found that, while both Schilling and Crofoot testified that Schilling played no part in the sale negotiations, he in fact participated in at least one of the negotiating sessions, met with All American about the terms of continuing his own employment, and executed the sales contract as secretary of Golden State (Pet. App. 15; Tr. 130–134, 134–138; GCX 15(b), p. 11).

The amount of Baker's backpay consisted of what he would have earned as a driver-salesman from August 16, 1963, the date of his discharge, to October 1, 1964, plus earnings as a distributor after October 1, 1964.[5] The Board found that, but for the unlawful discrimination against him, Baker would have been offered, and would have accepted, a distributorship contract on October 1, 1964 (Pet. App. 19–20; Tr. 231). The Board calculated Baker's earnings as a distributor from the earnings of Donald Thorne, the employee most comparable to Baker in total sales prior to Baker's unlawful discharge (Pet. App. 21–23).

The court of appeals, one judge dissenting, sustained the Board's findings and conclusions and enforced its backpay order (Pet. App. 32–36).

ARGUMENT

1. Petitioners do not contest the finding of the Board, sustained by the court below, that All American, the purchaser, continued the Golden State business in essentially the same form, and that thus, under the principles enunciated in *National Labor Relations Board* v. *Burns*, 406 U.S. 272, 279–281, All American is a successor employer for purposes of the National Labor Relations Act. Petitioners contend (Pet. 15–29),

[5] The Board found that Schilling's December 1968 offer, on behalf of Golden State, to reinstate Baker as a driver-salesman was invalid, since Baker was entitled to reinstatement as a distributor. The Board also found that Schilling had no authority to act for Golden State after the January 1968 transfer, and that Golden State no longer employed any driver-salesmen. (Pet. App. 24–25.)

however, that the Board lacks authority to require a successor to reinstate with backpay an employee wrongfully discharged by the predecessor, even though the Board order which issued prior to the transfer of the business was made applicable to Golden State and its "successors, and assigns" (147 NLRB at 411), and All American had knowledge of the unfair labor practice case before it acquired the business.[6] This issue does not warrant review by this Court.

In *Burns*, the Court held that a mere change of employers or of ownership does not affect a bargaining obligation imposed by the Act, "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent." 406 U.S. at 281. This holding rests on the principle that "[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 183 (C.A. 6). The same principle—as well as the "objectives of national labor policy, reflected in established principles of federal law"[7]—make it reasonable

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[6] Insofar as petitioners challenge (Pet. 30–32) the Board's finding (Pet. App. 16–17), which the court below sustained (Pet. App. 33), that All American had knowledge of the Board unfair labor practice litigation before it acquired the business, this merely presents an evidentiary issue which does not, by itself, warrant further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 496. In any event, the factors enumerated by the Board and the court below amply support the Board's finding.

[7] As the Court stated in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549: "The objectives of national labor policy, re-

to interpret the broad grant of remedial authority conferred on the Board by Section 10(c) of the Act,[8] as empowering it to require "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his * * * predecessor [to remedy] his predecessor's unlawful conduct." *Perma Vinyl Corp.*, 164 NLRB at 969. As the Board explained in that case (*ibid.*):

> When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the vic-

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flected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."

Although the Court did not find *Wiley*, which arose in the context of a suit under Section 301 of the Labor Management Relations Act to compel arbitration, controlling in the circumstances presented in *Burns*, it was not because it deemed the foregoing statement of policy inapposite for purposes of the National Labor Relations Act. In *Burns*, the Court simply held that the "freedom of contract" policy reflected in Section 8(d) of the National Labor Relations Act militated against imposing on a successor employer a duty, not only to bargain with the union representing the predecessor's employees, but to honor the predecessor's collective bargaining agreement.

[8] Section 10(c), 29 U.S.C. 160(c), empowers the Board, upon finding that a person has engaged in an unfair labor practice, to issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."

tims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.[9]

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[9] In the present case, Golden State President Crofoot agreed to indemnify All American for any liability arising from the Board proceeding (Pet. App. 15; Tr. 70–74). In view of this indemnity agreement, the court below correctly concluded (Pet. App. 33–34) that it was unnecessary to consider in this case whether the joint liability which the Board imposed on Golden State for backpay accruing after the transfer to All American would otherwise have been within the Board's power (Pet. 20–23). Moreover, contrary to petitioners' suggestion, the Board's order (Pet. App. 29) does not impose any reinstatement obligation upon Golden State.

Textile Workers v. *Darlington Mfg. Co.*, 380 U.S. 265, is inapposite. That case involved the close down of a business, and the Court specifically stated: "We * * * are not confronted with a sale of a going concern, which might present different considerations under §§ 8(a)(3) * * * [of the Act]" (*id.* at 272, n. 14).

The court below thus correctly sustained the Board's application of its *Perma Vinyl* doctrine in this case. Morever, its decision is consistent with that of the Fifth Circuit, the only other court of appeals which so far has had occasion to rule upon that doctrine. *U.S. Pipe & Foundry Co.* v. *National Labor Relations Board,* 398 F. 2d 544 (C.A. 5), enforcing the Board's order in *Perma Vinyl* itself. See also *Int'l Association of Machinists, District Lodge 94* v. *National Labor Relations Board,* 414 F. 2d 1135, 1139, n. 3 (concurring opinion) (C.A. D.C.), certiorari denied, 396 U.S. 889; cf. *United Automobile Workers* v. *National Labor Relations Board,* 442 F. 2d 1180 (C.A. 9). Finally, these decisions are not contrary to *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9. Although the Court there stated that the "term 'successors and assigns' in an enforcement order * * * may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure," it added that "in appropriate circumstances" the order could be "enforced against those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons,*" and that the answer depended upon "an appraisal of [the] relations" between "the defendant and the successor" (324 U.S. at 14–15; emphasis added). For the reasons given above, All American has sufficiently aligned itself with the Golden State enterprise to require it to remedy the unfair labor practice committed by that enterprise.[10]

[10] To the extent that *National Labor Relations Board* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (C.A. 10), and

2. The court below affirmed the Board's factual findings that, but for the unlawful discharge, Baker would have been offered and would have accepted a distributorship on October 1, 1964, and that thereafter he would have accumulated earnings comparable to those of distributor Donald Thorne (Pet. App. 34–35). In these circumstances, it was appropriate for the Board to include in Baker's backpay award what he would have earned as a distributor. Such inclusion is necessary to restore Baker to the position and earnings he would have attained but for his unlawful discharge on August 16, 1963, and thus "'can fairly be said to effectuate the policies of the Act.'" *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347.[11]

National Labor Relations Board v. *Lunder Shoe Corp.*, 211 F. 284 (C.A. 1), reflect a contrary view, their authoritative effect is diminished by the fact that they were decided before this Court, in *Wiley* and *Burns*, *supra*, emphasized the importance of protecting employees against changes in ownership of the employing enterprise.

Moreover, in *Birdsall* the successor employer was "adjudged of wrongdoing on its part without complaint, notice, full opportunity to present its defense and the other essential requirements of due process" (208 F. 2d at 237). Here, on the other hand, All American was made a party to the Board's backpay proceeding and was afforded a full opportunity, which it took, to contest the application to it of the Board's supplemental order (Pet. App. 2–3).

[11] Contrary to petitioners' contention (Pet. 39), the Board did not find that Golden State's distributors were "independent contractors." It held that it was unnecessary to resolve this question, since the unlawful discharge of Baker occurred while he was an employee (Pet. App. 20–21; see also Pet. App. 34). Petitioners' reliance upon *Brown* v. *National Labor Relations Board*, 462 F. 2d 699 (C.A. 9), is thus misplaced.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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October Term, 1972
No. 72-702

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

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Reply to Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

I.

Page

Statement of Facts 2

1. All American Had No Opportunity to Present a Defense to the Board Charges 2
2. Golden State's Distributors Were Independent Contractors 3
3. There Was No "Evidence" Proving Knowledge of Unfair Labor Practices on the Part of All American 4
4. The Distributors Assigned Their Distributorship Contracts 4

II.

Argument 5

1. The Successorship Doctrine Has No Application to Unfair Labor Practice Proceedings 5
2. By Its Silence, the Board Concedes That the Predecessor Has No Liability Beyond the Date of Sale of the Business 8
3. There Was No Evidence Whatsoever to Support the Board's Finding That the Successor Had Prior Knowledge of the Predecessor's Unfair Labor Practices 8
4. The Act Requires Payment of "Back Pay," Not "Speculative Profits" From an Independent Business 9

III.

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases	Page
Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967)	7
NLRB v. Birdsall-Stockdale Motor Co., 208 F.2d 234 (10 Cir. 1953)	2, 3, 7
NLRB v. Burns International Security Service, 406 U.S. 272 (1972)	5
NLRB v. Herman Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963)	7
NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954)	7
NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954)	7
Perma Vinyl Corp., 164 NLRB 968	7
Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945)	2, 3, 6, 7
Symms Grocer Co., 109 NLRB No. 58	7
Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965)	7, 8
U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968)	7
John Wiley & Sons v. Livingston, 376 U.S. 543 (1968)	5

Rules	
Rules of Court, Rule 65(d)	5

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Respondent.

Reply to Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Board's[1] response (hereinafter referred to as the "Board's Brief") to the Petition herein ignores points of major importance, misconstrues other significant arguments and misstates certain facts in material respects. By means of this Reply Brief, Petitioners seek to clarify the record now before this Court.

[1]In this Reply Brief, Petitioners will continue to use the terminology adopted and employed in their Petition for Writ of Certiorari.

I.

Statement of Facts.

The following comments in relation to the facts shall be limited to rectifying the following factual misstatements contained within the Board's Brief:

1. All American Had No Opportunity to Present a Defense to the Board Charges.

On page 11 of its Brief, the Board has erroneously stated that All American was not adjudged of wrongdoing without a complaint, notice, and full opportunity to present its defenses as required by the cases of *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945) and *NLRB v. Birdsall-Stockdale Motor Co.*, 208 F.2d 234 (10 Cir. 1953). The actual facts are that long prior to All American's purchase of the Pepsi-Cola Bottling Division, Golden State was found to be in violation of the National Labor Relations Act (hereinafter referred to as the "Act"). This decision had in fact been briefed and argued before the United States Court of Appeals for the Ninth Circuit many months before the purchase by All American. At no time was All American afforded any opportunity to contest the Board charges, present evidence negating the allegations, or cross-examine witnesses who testified on behalf of the Board.

Rather, All American was provided nothing more than a hearing with the limited scope of determining the amount of penalty to assess against it, the successorship issue and the knowledge issue. This is the equivalent of being adjudged of wrongdoing without complaint,

notice, or opportunity to present a defense; it is devoid of the essential elements of due process as specifically condemned in *Birdsall, supra,* and *Regal Knitwear, supra.*

2. Golden State's Distributors Were Independent Contractors.

The Board asserts that it did not find that the Golden State distributors were "independent contractors." While Petitioners concede that the Trial Examiner stated that it was unnecessary to resolve such an issue[2] (an erroneous conclusion, Petitioners submit), he nonetheless did resolve it by finding:

> "Respondent began converting its driver-salesmen to distributors, or *independent contractors,* by offering each of them . . . contracts as distributors, or *independent contractors,* under the terms of which they *realized net profits,* after the deduction of their own operating expenses, from the purchase of products from Golden State and the resale to customers . . ." [R. 119, lines 20-25; Pet. App. 17]. (Emphasis added.) See also R. 113, lines 12-20 (Pet. App. 4).

Thus, although the Trial Examiner may have deemed it unnecessary to decide this particular issue, there can be no doubt that he did in fact find that the distributors of the Petitioner Golden State were independent contractors.

---

[2]See Pet. App. 20-21. References to documents contained within the appendix to the Petition for Certiorari are designated "Pet. App."

3. There Was No "Evidence" Proving Knowledge of Unfair Labor Practices on the Part of All American.

The Board has attempted to support the action of the Trial Examiner in discrediting witnesses Schilling and Crofoot by reliance on the Trial Examiner's statement that each had testified that Schilling had played no part in the settlement negotiations when, in fact, he had participated in at least one of the negotiating sessions. However, the record reveals that Crofoot himself testified (i) that Schilling attended the first negotiation meeting and (ii) that Schilling had held individual private talks with the purchaser regarding his future status [Tr. 60, 62]. Moreover, Schilling confirmed this [Tr. 131].

4. The Distributors Assigned Their Distributorship Contracts.

Finally, the Board's Brief (at p. 4 thereof) states that the distributors of Golden State assigned their distributorship contracts to All American. The actual fact is that it was Golden State which assigned the distributorship contracts it had negotiated with the individual distributors to All American [GC. Ex. 15; Tr. 74].

While this point is of little substantive significance, it clearly demonstrates the Board's misunderstanding of fundamental character of the law and practice involved in the sale and purchase of a business. It is this basic misunderstanding which, Petitioners submit, has resulted in the Board's failure to understand Petitioners' position herein and render a decision in conformity with the realities governing such sales and purchases.

II.

Argument.

1. The Successorship Doctrine Has No Application to Unfair Labor Practice Proceedings.

The argument in the Board's Brief appears to be predicted upon the assumption that Petitioners concede All American to have been not only a successor to Golden State for collective bargaining purposes, but a successor for all purposes under the Act.[8] This is totally incorrect.

While Petitioners do concede that All American would be considered a successor employer for collective bargaining purposes, they by no means concede that such status is in any way relevant to unfair labor practice proceedings under the Act. By asserting a contrary contention, the Board obfuscates the long established practice and *Board created* distinction between representation cases and unfair practice proceedings.

The authority relied upon by the Board and the court below in rendering the decision herein, *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1968), has been limited to its facts and to the collective bargaining arena by the decision of this Court in *NLRB v. Burns International Security Service,* 406 U.S. 272 (1972). Any contrary holding conflicts directly with *Regal Knitwear, supra,* which had long before established the non-applicability of the successorship doctrine to unfair labor practice proceedings. In that case, this Court specifically held that Rule 65(d) cannot be used to extend the reach of the Board's order to "successors" or "assigns" who are innocent of wrongdoing and against

[8]The Board's Brief, page 6.

whom there existed no independent basis for adjudication of liability. In *Regal Knitwear, supra,* the Court stated that only "in appropriate circumstances" an order may be "enforced against those to whom the business may have been transferred whether by means of evading the judgment or for other reasons."

The Board has attempted to avail itself of this exception by arguing that the purchase of the business by All American with knowledge of pending unfair labor practice proceedings constitutes such "appropriate circumstances." Such facts fall far short of the exception carved out in *Regal Knitwear.*

The Board's interpretation not only ignores the context in which the articulated exception was set forth, but would, if given effect, completely abrogate the *Regal Knitwear* rule. The exception was formulated after this Court recognized that a successor may merely be a *disguised continuance* of an old employer, an instrumentality through which an employer or a defendant seeks to *evade* an order or a person in active concert or *participation* with the defendant. The Court specifically stated on page 15:

> "In both of these cases, *the reference is not merely to succession,* but to a relationship between the defendant and the successor which might *of itself* establish liability within the terms of Rule 65." (Emphasis supplied).

Such facts do not exist in this matter. Here, even the Board concedes that the transaction was completely bona fide and the transfer of interest genuine. Thus, to uphold the order of the Board and the decision of the court below, this Court must overrule *Regal Knitwear, supra.*

The articulated "authority" for the Board's apparent decision to ignore *Regal Knitwear, supra,* lies exclusively in its "Perma Vinyl" doctrine.[4] The decision rendered below is the first time that such doctrine has been approved without qualification by any court. The court in *U.S. Pipe & Foundry Co. v. NLRB,* 398 F.2d 544 (5th Cir. 1968), upheld the *Perma Vinyl* doctrine *only* in relation to the Board's order that a successor was liable for the reinstatement of a wrongfully discharged employee. That case *expressly refused* to sanction or adopt the Board's language which had declared the predecessor liable for back pay beyond the date of the sale of the business and its successor similarly liable for the period prior or subsequent to the date of the purchase.

Any reliance upon the *Perma Vinyl* doctrine constitutes nothing more than a bootstrap argument in view of the fact that that case was and remains, without explanation, not only in direct conflict with the decisions of this Court in *Regal Knitwear, supra,* and *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965) but also the following Circuit Court of Appeals' decisions directly on point and flatly preclusive of such a doctrine: *NLRB v. New Madrid Mfg. Co.,* 215 F.2d 908 (8th Cir. 1954); *NLRB v. Herman Bros. Pet Supply,* 325 F.2d 68 (6th Cir. 1963); *Makela Welding, Inc. v. NLRB,* 387 F.2d 40 (6th Cir. 1967); *NLRB v. Lunder Shoe Corp.,* 211 F.2d 284 (1st Cir. 1954); and *NLRB v. Birdsall-Stockdale Motor Co., supra.* Furthermore, in establishing this "doctrine," the Board ignored the exhaustive analysis and elaborate rationale supporting its own prior determination in *Symms Grocer Co.,* 109 NLRB No. 58, where it held that no authority

[4] *Perma Vinyl Corp.,* 164 NLRB 968.

existed under the Act for imposing such liability on a successor *with or without* knowledge.

2. By Its Silence, the Board Concedes That the Predecessor Has No Liability Beyond the Date of Sale of the Business.

It must be noted that the Board's Brief completely ignores the consequences of its order on the predecessor, Golden State. The Board does not dispute that its order is in direct conflict with the decision of this Court set forth in *Darlington, supra*. Furthermore, the Board's Brief makes no attempt to resolve the dilemma imposed upon Golden State by an order which continues the accrual of damages while providing absolutely no opportunity for their termination. The Board has simply ignored the fact that it has left a party faced with the obligation of paying back wages, *ad infinitum*, without any plausible means of terminating such continuing liability.

3. There Was No Evidence Whatever to Support the Board's Finding That the Successor Had Prior Knowledge of the Predecessor's Unfair Labor Practices.

The Board has held that All American had knowledge of the unfair labor practices of Golden State prior to its purchase of the Pepsi-Cola Bottling Division based upon a "disbelief" of witnesses who had been called by the General Counsel and who testified that knowledge did not exist. The Board drew an inference of knowledge from the failure of Petitioners to call witnesses who would have done nothing more than corroborate the testimony of the General Counsel's own witnesses.

The General Counsel had the burden of proof on the issue of whether knowledge existed. The *only* witnesses he called positively denied that such knowledge existed. Thus, no evidence was ever presented upon which a finding of knowledge could be based. Petitioners were

hardly under obligation to call further witnesses on the point. Therefore, no inference of knowledge could be legitimately drawn by the Board nor can its finding on the issue stand.

4. The Act Requires Payment of "Back Pay," Not "Speculative Profits" From an Independent Business.

The Board's Brief would have the Court ignore the fact that the order extends far beyond the scope of the Act by requiring the Petitioners to establish a wrongfully discharged employee in an independent business and pay him speculative damages in the form of "anticipated profits" from a business in which he had absolutely no prior experience and for which there was no prior earnings history.

III.

Conclusion.

The Board's Brief fails to reconcile the conflict between the opinion of the court below and the decisions of this Court and many Circuit Courts of Appeals. Furthermore, it ignores the several issues of first impression.

The potential for conflict and confusion which has been created by this drastic departure from the settled rules of prior decisions cannot be left unresolved. Therefore, Petitioners urge that their Petition be granted.

Respectfully submitted,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' OPENING BRIEF.

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SUBJECT INDEX

	Page
Opinions Below	2
Grounds for Jurisdiction in This Court	3
Constitutional Provision and Statutes Involved	3
Questions Presented	4
Statement of the Case	6
(1) Summary of Proceedings Below	6
(2) Facts Upon Which This Case Arises	8
(a) Subfranchising of Routes	9
(b) Sale of the Pepsi-Cola Bottling Business	11
(c) The Issue of Knowledge	12
(d) The Offer of Reinstatement	17
(e) The Supplemental Decision	18
Summary of Argument	20
Argument	22
I.	
The Board's "Perma Vinyl Doctrine" Contravenes the Authority Established by This Court and Several Courts of Appeals	22
A. The Application of the Perma Vinyl Doctrine to Extend Golden State's Liability for Remedial Action Past the Cut-Off Point of a Bona Fide Sale Is Contrary to Settled Authority of This Court and Offensive to Principles of Due Process	27
B. The Application of Perma Vinyl to Fasten Unlimited Liability Upon All American, Both Retrospectively and Prospectively, Conflicts With Decisions of This Court and Those of Other Courts of Appeals and, Additionally, Constitutes a Denial of Due Process	31

Page

C. Perma Vinyl Is Inapplicable to Establish Liability Against All American in Any Event, Since the Essential Element of Knowledge Cannot, Consistent With Due Process, Be Established on This Record 42

II.

The Scope of the Remedial Order Affirmed and Enforced Below Exceeded the Powers Granted to the Board by the Act 48

A. It Was Error for the Board to Impose Remedial Liability Beyond That Date When Baker Would Voluntarily Have Terminated His Employment With Golden State 51

B. The Board Exceeded Its Power in Purporting to Order Petitioners to "Reinstate" Baker Into a Nonemployment Situation by Establishing Him in an Independent Business 52

C. The Board Exceeded Its Power in Ordering Petitioners to Pay, Ostensibly as "Back Pay" Consequential Damages Based on Alleged Loss of Anticipated Profits of a Business 56

Conclusion 59

TABLE OF AUTHORITIES CITED

Cases	Page
East Texas Steel Casting Company, Inc., 116 NLRB 1336, enf'd 255 F.2d 284 (5th Cir. 1958)	53
Gainesville Publishing Company, 150 NLRB 602 (1964)	53
Handley v. Guasco, 165 Cal. App. 2d 703, 322 P. 2d 354 (1958)	59
International Union of Operating Engineers, Local 925 (J. L. Manta Inc., et al.), 180 NLRB No. 117 (1970)	53
Isis Plumbing and Heating Co., 138 NLRB No. 97, 51 LRRM 1122 (1962)	57, 58
John Wiley & Son v. Livingston, 376 U.S. 543, 11 L.ed. 2d 898, 84 S. Ct. 909 (1964)	26, 35, 36, 37
Kloberdanz v. Joy Mfg. Co., 288 F.Supp. 817 (D.C. Colo. 1968)	37
Liberty Electronics Corp., 143 NLRB No. 64, 53 LRRM 1370 (1963)	26
Macmorris Sales Corporation v. Kozak, 263 Cal. App. 2d 430, 69 Cal. Rptr. 719 (1968)	59
Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967)	23, 26, 28
Manley v. State of Georgia, 279 U.S. 16, 73 L.ed. 575, 49 S.Ct. 215 (1928)	47, 48
Mastro Plastics Corp., 136 NLRB No. 119, 50 LRRM 1006 (1962)	51, 52
M. Eskin & Son, 148 NLRB No. 107, 57 LRRM 1121 (1964)	24, 26, 34
Mooney Aircraft, Inc., 156 NLRB 326, enf'd 375 F.2d 402 (5th Cir. 1967)	53

Page

NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2nd Cir. 1953) 54

NLRB v. Birdsall-Stockdale Motor Company, 208 F.2d 234 (10th Cir. 1953) 24, 25, 26, 34

NLRB v. Burns International Security Service, 406 U.S. 272, 32 L.ed. 2d 61, 92 S. Ct. 1571 (1972) 36, 37, 40

NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939) .. 26

NLRB v. Golden State Bottling Company, Inc., 353 F.2d 667 (9th Cir. 1965) 6, 8

NLRB v. Herman Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963) 23, 24, 26, 28, 35

NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir.1954) 24, 25, 26, 35

NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954) 23, 26, 27

Perma Vinyl Corp., 164 NLRB No. 119, 65 LRRM 1186 (1967) .....4, 20, 21, 22, 23, 24, 25 .....26, 28, 33, 35, 37, 40, 41, 42, 48

Regal Knitwear v. NLRB, 324 U.S. 9, 89 L.ed. 661, 65 S. Ct. 478 (1945) ..23, 24, 26, 32, 34, 42

Schwartz v. McGraw-Edison Co., 14 Cal. App. 3d 767, 92 Cal. Rptr. 776 (1971) 37

Southport Petroleum Co. v. NLRB, 315 U.S. 100; 86 L.ed. 718; 62 S. Ct. 452 (1941) 23, 26

Symms Grocer Co., 109 NLRB No. 58, 34 LRRM 1326 (1954) 24, 26, 33

Textile Workers v. Darlington Mfg. Co., 380 U.S. 263; 13 L.ed. 2d 827; 85 S. Ct. 994 (1965) 23, 26, 27

Page

United Auto Workers v. NLRB, 442 F.2d 1180 (9th Cir. 1971) 20, 25, 32, 35

United States Pipe and Foundry Company v. NLRB, 398 F.2d 544 (5th Cir. 1968) 20, 22, 24, 25, 26, 32, 35

Western & A. R. Co. v. Henderson, 279 U.S. 639, 73 L.ed. 884, 49 S. Ct. 445 (1928) 46, 47, 48

Rules

Federal Rules of Civil Procedure, Rule 65(d) 4, 32

Rules of the United States Supreme Court, Rule 19 3

Statutes

Labor Management Relations Act, Sec. 1(b) 3

Labor Management Relations Act, Sec. 2(3) 3

Labor Management Relations Act, Sec. 7 3

Labor Management Relations Act, Sec. 8(a)(1) 3, 6, 8

Labor Management Relations Act, Sec. 8(a)(3) 3, 5, 6, 8

Labor Management Relations Act, Sec. 10(b) 3

Labor Management Relations Act, Sec. 10(c) 3, 33, 54, 55, 56, 58

Labor Management Relations Act, Sec. 10(e) 3

Labor Management Relations Act, Sec. 10(f) 3

United States Code Annotated, Title 28, Sec. 1254 3

United States Code Annotated, Title 29, Sec. 141-(b) 4

United States Code Annotated, Title 29, Sec. 152-(3) 4

Page

United States Code Annotated, Title 29, Sec. 157 4

United States Code Annotated, Title 29, Sec. 158-(a)(1) 4

United States Code Annotated, Title 29, Sec. 158-(3) 4

United States Code Annotated, Title 29, Sec. 160-(b) 4

United States Code Annotated, Title 29, Sec. 160-(c) 4

United States Code Annotated, Title 29, Sec. 160-(f) 4

United States Code, Title 29, Sec. 160(c) 56

United States Constitution, Fifth Amendment 3

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vs.

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Respondent.

PETITIONERS' OPENING BRIEF.

Their Petition for Writ of Certiorari having been accepted by this Court on February 26, 1973, Petitioners Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, and All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento[1] are now before this Court seeking reversal of the Opinion of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled cause on August 21, 1972.

[1]Hereinafter Golden State Bottling Company, Inc. will be referred to as "Golden State" and All American Beverages, Inc. as "All American" and collectively the two will be referred to as "Petitioners" or "Employers."

Opinions Below.

Petitioners come before this Court to seek reversal of the decision of the United States Court of Appeals for the Ninth Circuit below which affirmed and enforced without modification the Supplemental Decision and Order of the National Labor Relations Board (hereinafter referred to as the "Board") which, in turn, adopted without change the decision of its Trial Examiner. These decisions, in chronological order, were as follows:

1. On July 13, 1970, the Trial Examiner, Robert L. Piper, executed and filed the Trial Examiner's Supplemental Decision which is incorporated into the decision of the Board. This decision, as incorporated, is reproduced as Appendix "A" to the Petition for Certiorari filed herein (the decision and recommended order of the Trial Examiner, together with the decision of the Board, shall hereafter be referred to collectively as the Board's "Supplemental Decision").
2. On January 21, 1971, the Board upheld the Trial Examiner *in toto* and adopted his Supplemental Decision and Order. This Decision has been reported in 187 NLRB No. 142, 76 LRRM 1868 (1971) and is contained in the single Appendix, commencing on page 56 thereof.
3. The "*Per Curiam*" decision of the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as the "Opinion"), Judge Kilkenny dissenting, affirmed and enforced *in toto* the decision of the Board. The Opinion is

reported as 467 F.2d 164 (9th Cir. 1972), and is reproduced as Appendix "B" to the Petition for Writ of Certiorari.

4. Along with its Opinion, the Court of Appeals for the Ninth Circuit also rendered its Judgment as set forth in Appendix "C" to the Petition for Certiorari. This Judgment grants enforcement of the Board's Supplemental Decision in all respects.

Grounds for Jurisdiction in This Court.

The Opinion below decides and applies several important questions of federal law contrary to decisions of this Court and several Courts of Appeals, as well as certain important federal questions of first impression. On this basis, Petition for Writ of Certiorari was made to this Court on November 8, 1972 pursuant to 28 U.S.C.A. Section 1254 and U.S. Sup. Ct. Rule 19. On February 26, 1973, this Petition was granted. ___ U.S. ___.

The Opinion below was dated and entered on August 21, 1972; no order was sought or made respecting rehearing or respecting an extension of time within which to petition for Certiorari.

Constitutional Provision and Statutes Involved.

The constitutional provision involved herein is the due process clause contained within the Fifth Amendment to the United States Constitution. The statutes invoved in the cause are contained within the Labor Management Relations Act (hereinafter referred to as the "Act"), Sections 1(b); 2(3); 7; 8(a)(1), (3); 10 (b), (c), (e), (f) as Amended, (29 U.S.C.A. Sections

141(b); 152(3); 157; 158(a)(1), (3); 160(b); 160 (c); 160(f)) as well as Rule 65(d) of the *Federal Rules of Civil Procedure* (28 U.S.C.A.). The constitutional provision and the statutes cited are, in pertinent part, printed verbatim and are reproduced as Appendix "D" to the Petition for Writ of Certiorari previously filed by Petitioners.

Questions Presented.

In its deceptively simple Opinion, the Court of Appeals plows large sections of new ground in the field of labor law. It fastens upon *both* parties to the bona fide purchase and sale of a business virtually unlimited joint and several liability, prospectively and retroactively, to remedy the unfair labor practices of the seller by approving and actually applying, for the first time in its full sweep, the Board's so-called "*Perma Vinyl* doctrine." In so doing, the Opinion raises the following questions:

1. If the owner of a business sells and transfers its entire ownership and interest in that business to a bona fide third party purchaser in a bona fide transaction:
   (a) Can the liability of the seller to remedy past unfair labor practices be extended past the time of such sale and continued *ad infinitum* in spite of the fact that the seller is thereafter incapable of terminating this liability?
   (b) Can the bona fide purchaser be held liable, jointly and severally with the seller, to remedy such unfair labor practices, not only prospectively from the time of the sale and transfer, but retroactively, for the en-

tire period prior thereto, by virtue of the mere fact (assumed *arguendo*) that it takes with knowledge of such unfair labor practice?

(c) Can such pre-sale knowledge be established by "imputation", *ex post facto*, merely by virtue of the buyer's post-sale retention of supervisory personnel formerly employed by the seller?

(d) If knowledge cannot be established by such imputation, has the Board satisfied its burden of proving such knowledge merely by discrediting the adverse testimony of its own witnesses on the issue and by drawing adverse inferences from Petitioners' failure to call officers of the purchaser in order to corroborate the negative testimony of the General Counsel's witnesses on the point?

The Opinion further establishes several new and rather startling principles of application to the specifics of the familiar back pay and reinstatement remedies uniformly ordered in wrongful discharge cases under the Act, thus giving rise to the following further questions:

2. If an employer is found to have discharged an employee wrongfully and discriminatorily in violation of Section 8(a)(3) of the Act:

(a) Can such employer be required to pay to such employee back pay beyond the time when, as found by the Board, such employee would, in any event, have voluntarily terminated his employment relationship with the company?

(b) In compliance with the customary order to "offer such employee reinstatement to his former or substantially equivalent position," can an employer be required to offer "reinstatement" to a non-employment position by establishing such former employee in an independent business?

(c) In compliance with the usual order to pay back pay to such employee/discriminatee, can the employer be required to pay compensatory damages to such employee for loss of anticipated profits from an independent business which had yet to be established, particularly where such employee has no prior independent business experience?

Statement of the Case.

(1) Summary of Proceedings Below.

The Board's original order herein was issued on 10 June 1964. It found that Golden State had committed certain unfair labor practices, including the wrongful discharge of Kenneth L. Baker[2] (hereinafter referred to simply as "Baker") on 16 August 1963. The Board's order included, as to Baker, the customary remedies of reinstatement and back pay.

Review of this order was sought by Golden State in the United States Court of Appeals for the Ninth Circuit. That court handed down a decision in December 1965,[3] granting enforcement as to certain portions of

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[2]A violation of Sections 8(a)(1) and 8(a)(3) of the Act.

[3]*NLRB v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

the order, including those relating to Baker, while denying it as to other significant parts. As a consequence of circumstances explained below, this decision did not become final until 27 November 1968, almost three years later.

In the compliance phase of the matter which ensued, a disagreement arose regarding the Board's interpretation of certain events occurring between the time of the Board's original order and the final decision granting enforcement. This interpretation, in Petitioners' view, expanded the remedies ordered in a manner which exceeded the Board's powers in the premises.

As a consequence, the matter went to Supplemental Proceedings upon a back pay specification issued as against both Golden State and its successor-in-interest, All American. Following hearing, a decision was issued by the Trial Examiner on 13 July 1970,[4] which was adopted without modification by the Board on 21 January 1971,[5] (collectively, the Supplemental Decision).

The Supplemental Decision confirmed the Board's expanded views regarding the subject remedies, as proposed by the General Counsel. Accordingly, Petitioners sought review in the Court of Appeals for the Ninth Circuit; the Board, in turn, cross-petitioned for enforcement. That court, on 21 August 1972, handed down its decision, *per curiam* (one member dissenting), granting enforcement of the Supplemental Decision in its entirety.

A Petition for Certiorari filed with this Court on November 8, 1972 was granted on February 26, 1973.

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[4]Appendix A to the Petition for Writ of Certiorari previously filed herein.

[5]App. 56.

(2) Facts Upon Which This Case Arises.

The original dispute herein involved, in addition to the §§ 8(a)(1) and 8(a)(3) charges relating to Baker, many other issues of rather more importance (as originally viewed by Golden State). Although each issue, including those relating to Baker, was vigorously contested, the Board rendered its opinion upholding the majority of the charges. The portions of the Board's order relating to Baker ordered the customary remedies of reinstatement and back pay; that is to say, it ordered Golden State to offer to Baker reinstatement to his former position, or a substantially equivalent one, and, further, ordered the employer to make him whole for any back pay loss suffered as a consequence of his wrongful termination.

The employer sought review of the entire Board order in the Court of Appeals which, as noted above, handed down a decision on 2 December 1965 agreeing with Golden's State's contentions in many respects by denying enforcement as to significant portions of the Board's order, while enforcing the balance, including the portions relating to Baker.[6] The Board's petition for rehearing was denied on 4 January 1966.

On 4 April 1966, however, the court granted a Board motion requesting that it reconsider this denial of rehearing. In November 1968, some two and one-half years following this submission, the court, upon such reconsideration, reaffirmed its original denial of rehearing. As a consequence, it was not until 27 No-

[6] *NLRB v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

vember 1968 that the court's final decree implementing this first decision was actually entered [App. Cert. 1-2].[7]

During the hiatus occurring between the Board's original order in June 1964 and the entry of the Court of Appeals' enforcement decree in November 1968, two separate events occurred. Both of these set in motion circumstances which, as noted above, bear vitally on the issues herein. They are the same events giving rise to the disagreement over compliance which led to the necessity for Supplemental Proceedings. These events were (a) the subcontracting of the majority of Golden State's sales routes to independent distributors commencing 1 October 1964, and (b) Golden State's sale and transfer of the remaining portions of its Pepsi-Cola business to All American on 31 January 1968.

(a) *Subfranchising of Routes.*

Prior to October 1964, the distribution function of Golden State's Pepsi-Cola operation had been carried out through the medium of employee driver-salesmen, each operating on an assigned route within the Company's franchise territory.[8] On 1 October 1964, Golden State began contracting out this activity through-

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[7]References to the Single Appendix submitted herewith are designated "App." References to the Appendix attached to the Petition for Writ of Certiorari previously filed herein are designated "App. Cert." References to the record reproduced as "Volume I Pleadings" are designated "R." References to the reporter's stenographic transcript of the hearing filed with the Court are designated "Tr." References to the exhibits introduced by the General Counsel are designated "GC Ex." References to exhibits introduced by Petitioners are designated "Pet. Ex."

[8]Golden State had other business interests in addition to its Pepsi-Cola business. These other interests, however, were separate, and the Pepsi operation was the only aspect of Golden State's operations which involved soft drink bottling or distribution.

out the major part of its franchise territory, to independent distributors [App. Cert. 4-5; App. Cert. 17; App. 219-220; App. 237-239; Pet. Ex. 3]. As it did so, it eliminated a majority of the old driver-salesman positions and, to that extent, curtailed or cut back on the scope of its distributive activities.

The Trial Examiner determined that these distributors were, in fact, independent contractors [App. Cert. 17]. This finding was based on undisputed evidence that these distributors received no salary or commissions, but, rather, depended for compensation on any net profits earned after deduction of operating expenses, inventory costs, etc. from their gross sales proceeds. The distributors were responsible for furnishing their own equipment and hiring and paying whatever manpower they needed. They were free to extend credit, bore all risk of loss,* including risks of collection and were not subject to supervision.

Ultimately, Golden State terminated well over fifty percent of its distribution operation through this subcontracting. The company, however, always retained (and its successor still retains) a few "house routes" operated by employee driver-salesmen.

In effecting this transition, the initial distributors, for the most part, were recruited from the ranks of the driver-salesmen, to a selected number of whom distributorship contracts were offered. Not all of them, however, were given that opportunity [Tr. 189; App. 206-208; App. 213-214; App. 102B].

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*Two of the driver-salesmen who became independent distributors for Golden State went bankrupt [Tr. 271-273]. Two other driver-salesmen who became distributors asked for and obtained back their positions as driver-salesmen after they were unable to succeed as distributors [Tr. 272].

By this change,

1. Golden State went out of the soft drink distribution business in those areas which were subcontracted to distributors;
2. Those driver-salesmen who accepted distributorship contracts voluntarily left the employ of Golden State to go into business for themselves; and
3. Golden State continued to bottle Pepsi-Cola products, but restricted its distributive operation to those portions of the franchise territory still retained as "house routes."

Until the time of the sale, therefore, Golden State was always in a position to offer reinstatement to Baker as a driver-salesman, in the sense that a few such positions still existed; the same is true as to All American following the sale.

While the issue was sharply contested before the Trial Examiner, the Board found on conflicting evidence (and Petitioners do not here dispute) that Baker would have been offered an independent distributorship had he not been previously terminated and that he would have accepted the same and become a distributor as of 1 October 1964 [App. Cert. 19].

It may also be noted that Baker, shortly following his original discharge, obtained other, permanent employment, which ultimately proved to be better paying than his old job, and he was still so employed at the time of the hearing [App. 102B].

(b) *Sale of the Pepsi-Cola Bottling Business.*

Effective 31 January 1968, Golden State sold its Pepsi-Cola Bottling Division to All American [App. Cert. 6]. Under the sale agreement, All American pur-

chased the entire assets of the Pepsi-Cola operation, but assumed only certain specific liabilities. As a part of the transaction, the distributorship contracts, with the written consents of the individual distributors in each case, were assigned by Golden State to All American [App. 60]. This sale terminated all activity on the part of Golden State in the soft drink bottling and distribution business.

The purchaser, All American, was a Delaware corporation having its principal offices in Providence, Rhode Island, which, among other enterprises, conducted Pepsi-Cola bottling and distribution operations in Springfield, Ohio [App. 60; App. 119; App. 132; App. 38]. Prior to the purchase in question, it had no assets or activities in the Sacramento area.

It is undisputed, indeed the Board found, that the transaction was entirely bona fide, in the sense that it was negotiated at arm's length between independent parties, was in no way collusive or evasive of the Board's order and that it did not in any way involve or result in a disguised continuance of Golden State's original ownership [App. Cert. 8].

(c) *The Issue of Knowledge.*

The only significant disputed issue touching the sale was the question of whether or not All American had actual pre-sale knowledge of the proceedings arising out of Baker's discharge.

The agreement of sale was silent as to the pendency of these proceedings, and no mention was made of Golden State's possible liability thereunder. Such liability was not one of those specifically enumerated in the agreement as being assumed by All American [App. 80], rather, the agreement contained the usual provision warranting that no pending litigation existed.

Two witnesses were called by the General Counsel on this issue: (a) Edwin J. Crofoot, the controlling shareholder and President of Golden State; and (b) Gene Schilling, General Manager of Golden State's Pepsi-Cola operation who, subsequent to the sale, was employed by All American in the same capacity with the title of "President" of the Sacramento Bottling Division.[10]

Both of these witnesses testified that the unfair practice proceedings involving Baker were never mentioned in the course of the negotiations and were never disclosed to or discussed with All American [App. 170-172, 119, 121, 127-128, 129-130]. They explained that this was due simply to oversight. The case had not been regarded as one involving a significant degree of liability because of Baker's speedy reemployment. Furthermore, it had lain dormant for so long at the appellate level that its continued pendency was simply forgotten.

The Board, faced with a total lack of affirmative evidence on an issue as to which it carried the burden, "solved" its problem by first discrediting entirely the testimony of both Crofoot and Schilling on the issue [App. Cert. 13].

This discreditation was based on a sort of comedy of errors arising from a failure of communication. Since the first appeal, Golden State had been represented in these proceedings by Morton B. Jackson, Esq. of Los Angeles in the latter's capacity as labor counsel to the Sacramento Bottlers Association, of which Golden

[10]Schilling never became an officer of All American and at no time pertinent herein was he a shareholder of that corporation. Neither was he ever a shareholder of Golden State, although, up until the time of the sale to All American, he was corporate secretary.

State was (and All American now is) a member [Tr. 284-286]. His retainer was confined to labor matters only and he had, as a consequence, no knowledge of the negotiations or the agreement which culminated in the sale of the business to All American, nor did he become aware of the fact of the sale itself until the Fall of 1969, when he was preparing a response to the original back pay specification herein [App. Cert. 6 and 7].

In connection with the sale of the business, Golden State was represented throughout by its regular corporate counsel, A. I. Diepenbrock, Esq. of the Sacramento firm of Diepenbrock, Wulff, Plant & Haggegan [App. 117].

Because of this failure of communication, when the proceedings entered the compliance phase following the entry of the Court of Appeals' enforcement decree in November 1968, Jackson's initiatives vis-a-vis the Board with respect to compliance were undertaken in the belief that he was continuing to represent Golden State and that Golden State continued to own Sacramento Pepsi-Cola. The successorship issue did not become apparent, therefore, either to the Board or to Jackson until much later.

Nonetheless, the Trial Examiner chose to discredit Schilling upon the equivocal fact that he signed several documents purportedly on behalf of Golden State subsequent to the sale of the business and at a time when he was no longer employed by that company or authorized to act in its behalf. These documents included the following:

1. A Substitution of Attorney dated 14 November 1968, signed by Schilling purportedly on behalf of Golden State [App. 82].

2. A Certificate of Posting of a Notice concerning unfair labor practices also signed by Schilling on or about 11 December 1968 [App. 93].

3. Golden State's answer to the original back pay specification verified by Crofoot in early November 1969 [App. Cert. 14].

In addition to the foregoing, the Board also points to the letter offer of reinstatement (discussed below) dated 11 December 1968 [App. 91], despite its unequivocal character.

These documents, of course, were the natural consequence of the confusion resulting from the fact that neither the Board nor Golden State's attorney were aware, at the time the Court of Appeals' order of enforcement was entered in November 1968, that All American had purchased the business and had, for some ten or eleven months, been its new owner. Schilling, on the other hand, signed the documents tendered to him by the experts on the understandable assumption that they knew what they were doing.[11]

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[11] "Mr. Jackson, I am not an attorney. All of these labor problems started under the name of Golden State Bottling Company, which to me is the Pepsi-Cola Bottling Company. These letters were prepared either by you or the National Labor Relations Board; the contents of them I was aware of. I assumed that inasmuch as they were started against the Golden State Bottling Company they would be concluded against the Golden State Bottling Company. Frankly, I wasn't aware of the fact that I was signing Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento. As a matter of fact, on Exhibit G.C. 21(a), the bulletin which we posted on the bulletin board, that is, the 'Employer's Golden State Bottling Company, Employer, d/b/a Pepsi Cola.'

"I shouldn't say that. G. G. Schilling, President. I was referring to Gene G. Schilling, President of Pepsi-Cola Bottling Company, a division of All American Beverages. Finally, I just—I wasn't aware of this." [App. 200-201].

As a consequence of this misunderstanding, the Board's usual notice and certificate of posting was routinely issued and sent to Schilling for signature on behalf of Golden State, the original employer in the proceedings; similarly, Jackson, whose office affiliation had changed, prepared a Substitution of Attorney upon the same assumption and secured Schilling's signature thereon; in the same vein he prepared an answer on behalf of Golden State to the original backpay specification which was verified by Crofoot on behalf of that party.

Just why all of this perfectly explainable *post-sale* conduct should give rise to such sinister conclusions affecting credibility or in any way reflect on the pre-sale state of All American's knowledge is not entirely clear. Certainly the appearance of these equivocal and anomalous documents was confined to this brief period and did not continue following counsel's discovery of the fact of sale.

In addition to the foregoing, the Board pointed to certain alleged "contradictions" in Schilling's and Crofoot's testimony regarding the extent of Schilling's participation in the sale negotiations—a "conflict" which disappears completely when other portions of the testimony of the same witnesses are viewed.[12]

It is Petitioners' position in this matter that the Board's reasons for discrediting the testimony that no

[12]The Board has attempted to support the action of the Trial Examiner in discrediting witnesses Schilling and Crofoot by reliance on Trial Examiner's statement that each had testified that Schilling played no part in the settlement negotiations when, in fact, he had participated in at least one of the negotiating sessions. However, the record reveals that Crofoot himself testified (i) that Schilling had attended the first negotiating meeting, and (ii) that Schilling had held individual private talks with the purchaser regarding his future status [App. 117-119]. Moreover, Schilling confirmed this [App. 164-165].

knowledge existed, whether tenable or untenable, are irrelevant in determining the actual existence of any pre-sale knowledge on the part of All American. However, since the Board below relied quite heavily upon the foregoing matters, and its extensive designation of the record (Single Appendix) relating to such matters indicates that it will continue to press these points, Petitioners, in anticipation of the Board's position, have included them in its factual statement despite their arguable relevancy.

(d) *The Offer of Reinstatement.*

After the final order of the Circuit Court was rendered in November 1968, a good faith attempt was made to comply with its provisions. However, the Trial Examiner in his Supplemental Decision held that such efforts, and the events which proceeded them (those two events described above), were insufficient to terminate the continuing accrual of liability.

On 11 December 1968, within a matter of days following the entry of the Court of Appeals' decree of enforcement, a written offer of reinstatement was transmitted to Baker. This offer was written on the letterhead of the "Pepsi-Cola Bottling Company of Sacramento" and was signed by one Gene Schilling as "President" [App. 91]. No reference may be discerned anywhere in the letter or letterhead to either Golden State or All American. The offer was quite unequivocal on its face and simply offered Baker reinstatement to his old job as a driver-salesman.

At the time this offer was made, All American had been the new owner of Pepsi/Sacramento for almost a year. Gene Schilling, the signatory, was the "President" of the Sacramento Bottling Division of All American.

He had been Golden State's General Manager of the same operation prior to the sale [App. Cert. 5-6].

(e) *The Supplemental Decision.*

In the supplemental proceedings, the employer took the position that an unequivocal offer of reinstatement to Baker of his former position as a driver-salesman would satisfy the reinstatement portions of the order, and that the back pay portions would be satisfied by the payment of whatever sums would have been earned by him in that position less offsets attributable to interim earnings in his new job.

The Board disputed this, claiming that the distributorships, regardless of whether they be viewed as incidents of employment or independent contract,[13] represented a "promotion" which Baker would have received but for his wrongful discharge and that the employer's duty, under the order was therefore to offer him (a) a distributorship, and (b) not to pay him back pay, but, rather, consequential damage in the form of back profits which he would have earned as a distributor subsequent to 1 October 1964.

Under the employer's view, the back pay award would not have been large; under the Board's view, it was of considerable magnitude, since a distributor's

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[13]When asked to set forth his position on this issue, the General Counsel stated "Our position will be that whether or not these individuals were independent contractors is really irrelevant insofar as the standpoint of remedy for Mr. Baker's discharge is concerned. We would certainly concede that if Mr. Baker had been an independent contractor at the time of his discharge, there would have been no violation, but since there is no such contention, our position is that it is really not relevant. We are talking about remedy here, not the scope of violation." [App. 104-105].

profits, when profits were indeed earned, could exceed the salary and commissions paid to employee driver-salesmen.

The original back pay specification was framed to pose only the issues reflected by this dispute. When Jackson discovered the fact of the sale, he immediately notified the Board which, in turn, withdrew the original specification in order to consider the applicability of the successorship issue [App. Cert. 2]. The amended specification joined All American as a party and sought to impose upon it joint and several liability with Golden State, on the theory that it took with knowledge of the unfair practice proceedings. The matter went to hearing upon the issues framed by the amended specification.

The Supplemental Decision ultimately required something quite different from what was contemplated in the original order as enforced by the Court of Appeals:

Golden State, and All American as well, were ordered to pay to Baker not back salary but the "profits" he would allegedly have realized as a distributor. Instead of being required to reinstate Baker to his former job, both employers were ordered to offer him a distributorship/sub-franchise.

In addition to the foregoing, the Board also held the original employer, Golden State, liable for such "reinstatement," as well as "back pay" accrual, *subsequent* to the sale of its business and beyond the time when it had any power to offer or perform any reinstatement of any kind as to Baker.

Further, the Board imposed coextensive liability, retroactive as well as prospective, upon All American, concededly a bona fide purchaser.

Summary of Argument.

The issues in this case may be grouped under two principal heads:

(a) Those relating to the extent to which remedial liability for unfair labor practices can be imposed against the seller/predecessor and the purchaser/successor of a business; and

(b) Those relating to the sweep of the remedy itself without regard to the party against whom imposed.

In this area of seller/purchaser liability, the Circuit Court below has adopted and applied, for the first time in its full sweep, the Board's so-called *"Perma Vinyl* doctrine" first enunciated in the decision of that name (*Perma Vinyl Corp.*, 164 NLRB No. 119, 65 LRRM 1186 (1967)). The decision in this respect contravenes settled lines of authority established by this Court and the holdings of the other circuits. This *Perma Vinyl* doctrine is not only unsupported by authoritative decisions and legislative sanction granted in the Act, but also represents a far less sound approach in national labor policy.

Only twice before has this doctrine ever been considered by the Courts of Appeals—once by way of *dictum*, in the Court of Appeals for the Ninth Circuit[14] and earlier, by way of partial application only, in the Court of Appeals for the Fifth Circuit.[15]

Even should the resolution of this conflict by the Court result in the adoption and approval of the

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[14]*United Auto Workers v. NLRB*, 442 F.2d 1180 (9th Cir. 1971).

[15]*United States Pipe and Foundry Company v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

"*Perma Vinyl* doctrine", however, a further issue, in the within cause, would be presented by reason of the Board's failure to establish the purchaser's prior knowledge of the seller's unfair labor practices, a requisite for the application of the doctrine in any event. In this regard, Petitioners seek a determination of the question whether the technical devices resorted to by the Board and the court, in an effort to raise and support such a finding as a substitute for evidence, are not offensive to the fundamental notion of due process.

Under the second basic head, this Court is first presented an issue, which, if decided in conformity with Petitioners' contentions, would be dispositive of all issues presented herein by mooting each of them. This issue revolves around the voluntary termination of employment by Baker which, consonant with earlier Board and Court decisions (but in contradiction to the court's holding herein), would also terminate any further liability of Petitioners to remedy this unfair labor practice.

Two further questions involving the extent of the Board's remedial powers under the Act, both of first impression, are presented. Petitioners urge that the Order which required them, ostensibly by way of reinstatement, to establish the discriminatee Baker in an independent business, exceeds such powers. Additionally, they urge that a purported back pay award which, in actuality, amounted to an order to pay consequential damages in the form of anticipated profits in an independent business likewise exceeds such powers.

ARGUMENT.

I.

The Board's "Perma Vinyl Doctrine" Contravenes the Authority Established by This Court and Several Courts of Appeals.

This matter, in Petitioners' view, is a fairly straightforward "back pay" case. Had the Board applied the settled principles applicable to such cases, the matter would not now be before this Court. Instead, however, the Board chose to apply the novel and comprehensive doctrine first articulated in *Perma Vinyl Corp., supra,* enforced in part only, *sub. nom. U.S. Pipe and Foundry Co., supra.*

In *Perma Vinyl,* the Board required a bona fide purchaser/successor corporation having pre-sale knowledge of its predecessor's prior unfair practices, to offer reinstatement to employees discharged in violation of the Act. It did not require the purchasing corporation to pay remedial back pay; it did not hold the selling corporation liable for reinstatement or for back pay beyond the date of the sale. However, the Board did not stop there. It announced that thenceforth, as a rule of prospective application, even though a purchaser and the sale itself be wholly bona fide and a genuine transfer of ownership, the Board would nonetheless hold the seller *and* the buyer liable *jointly and severally* for both reinstatement *and* back pay, if the purchaser took with prior knowledge of the unfair labor practice proceeding.

In so doing, it not only far exceeded the scope of its holding in the case before it; it also reversed itself on it own established doctrine, and contravened several prior Court of Appeals' holdings and at least three decisions of this Court on the points in question.

Two fundamental aspects of remedial liability are involved: those of a predecessor/seller, and those of a successor/purchaser.

Prior decisions of this Court and other circuits were and are clear that the accrual of liability on the part of a seller to remedy unfair labor practices is terminated by the bona fide sale and transfer of the business in question:

Textile Workers v. Darlington Mfg. Co., 380 U.S. 263; 13 L.ed. 2d 827; 85 S. Ct. 994 (1965), (herein referred to as "*Darlington*");

Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106; 86 L.ed. 718, 724; 62 S. Ct. 452 (1941), (herein referred to as "*Southport Petroleum*");

NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954), (herein referred to as "*New Madrid*");

NLRB v. Herman Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963), (herein referred to as "*Herman Pet Supply*");

Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967), (herein referred to as "*Makela Welding*").

Prior to *Perma Vinyl* it had been equally clear, from settled decisions of this Court and other circuits, that the bona fide purchaser of a business, in a transaction which constituted a genuine arms-length, non-collusive sale and transfer, took free of any liability for the predecessor seller's unfair labor practices, whether such purchaser took with or without knowledge thereof:

Regal Knitwear v. NLRB, 324 U.S. 9, 89 L. ed. 661, 65 S. Ct. 478 (1945), (herein referred to as "*Regal Knitwear*");

NLRB v. Birdsall-Stockdale Motor Company, 208 F.2d 234 (10th Cir. 1953), (herein referred to as "*Birdsall-Stockdale*");

NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954), (herein referred to as "*Lunder Shoe*");

NLRB v. Herman Bros. Pet Supply, supra.

To be distinguished is the situation (concededly not present here), where the purchaser has participated in or acted in concert with his predecessor in the commission of the unfair practices charged, and could thus be held independently liable as a primary wrongdoer (*Cf. Regal Knitwear, supra*).

Perma Vinyl not only conflicts with the foregoing two lines of authority; it also conflicts with previously settled Board doctrine on the same point:

Symms Grocer Co., 109 NLRB No. 58, 34 LRRM 1326 (1954), (herein referred to as "*Symms Grocer*");

M. Eskin & Son, 148 NLRB No. 107, 57 LRRM 1121 (1964), (herein referred to as "*Eskin*").

The foregoing three separate lines of authority will be developed and discussed below in examining their specific application to the holding in the case at bar. For the moment, however, let us continue our examination of *Perma Vinyl* itself.

The Board decision therein was reviewed, on enforcement proceedings, by the Court of Appeals for the Fifth Circuit, *sub. nom. U.S. Pipe and Foundry Co. v. NLRB, supra* (herein referred to simply as "*U.S. Pipe and Foundry*"). That Court noted some of the con-

trary decisions, principally those of *Birdsall-Stockdale, supra,* and *Lunder Shoe, supra,* but did not attempt to reconcile the conflicting lines of authority. In effect, it settled for the fact that it disagreed with them and agreed with the Board's rationale—up to a point. It enforced the decision in respect of its specific holding, that is to say, in requiring the successor to offer reinstatement only; and it pointedly withheld approval of the balance of the Board's broad language, both that affecting joint and several liability of successors and predecessors in every respect, and also that touching the specific area of liability for back pay.

In brief, *U.S. Pipe and Foundry* gave something considerably less than unqualified approval to the *"Perma Vinyl* doctrine," as the Board viewed it.

In *United Auto Workers v. NLRB,* 442 F.2d 1180 (9th Cir. 1971), (herein referred to as *"United Auto Workers"*) the Ninth Circuit declined to enforce liability for the predecessor's unfair labor practices against a bona fide purchaser corporation which took, *arguendo,* with knowledge where the business after changing hands was not essentially the same as previously. This was the extent of the court's holding. Nevertheless, in a concluding paragraph, the court, by Judge Tuttle (on assignment from the 5th Circuit), went on to express uncritical approval of the entire breadth and sweep of *Perma Vinyl,* omitting even the caveats expressed by his own Circuit in *U.S. Pipe and Foundry.* This language, we submit, is quite beyond the actual holding and, therefore, *dictum* in the premises.

Until the Board and court holdings below in the case at bar, the so-called *"Perma Vinyl* doctrine" amounted to no more than that, namely, an announced

policy which had never actually been fully applied in a decided case. The case at bar transports Perma Vinyl from the realm of announced doctrine into actual holding, and thus, for the first time, poses the full conflicts envisaged by the court in *U.S. Pipe and Foundry*.

The full extent of those conflicts may be understood only when one appreciates that *Perma Vinyl* utilizes a bona fide change of ownership as a means of multiplying liability in that it adds to the picture another party against whom full recourse may equally be had, while preserving the same amplitude of recourse against the transferor even following the sale. Settled principles would regard such a sale as a cut-off point; the Board seems to view it as a flood gate.

The curious thing is that the Board itself, in formulating the doctrine, did not address itself to the contrary authority posed by its own *Eskin, Symms Grocer* line of decisions, or even advert to the *Darlington/Southport Petroleum/New Madrid/Herman Pet Supply/Makela/Regal Knitwear/Lunder Shoe/Birdsall-Stockdale* lines of authority. Nor did it answer the arguments posed by these cases. It simply avoided them (although it cited, inexplicably, *Regal Knitwear*). It relied, instead, upon cases totally inapposite: *John Wiley & Son v. Livingston*, 376 U.S. 543, 11 L.ed. 2d 898, 84 S. Ct. 909 (1964), (herein referred to as "*Wiley*"), a case which, as we point out below, involved contractual liability; *Liberty Electronics Corp.*, 143 NLRB No. 64, 53 LRRM 1370 (1963), also involving contractual liability *specifically assumed* by the purchaser; and *NLRB v. Colten*, 105 F.2d 179 (6th Cir. 1939), in which there was simply no true change of ownership, and therefore no genuine sale.

A. The Application of the Perma Vinyl Doctrine to Extend Golden State's Liability for Remedial Action Past the Cut-Off Point of a Bona Fide Sale Is Contrary to Settled Authority of This Court and Offensive to Principles of Due Process.

The Board found that Golden State's sale of its Pepsi-Cola division was a genuine sale and transfer of the whole of that business, at arms-length, to a bona fide purchaser which, until that time, had been a stranger to Golden State and to Sacramento. Effective with that transaction, Golden State went out of the soft drink business and terminated all activity in that and related fields. Following the sale, Golden State was, therefore, no longer capable of offering or performing on reinstatement as to Baker.

The law applicable to such a situation is set forth in *Darlington, supra,* wherein this Court quoted with approval, in support of its holding, the following language from *New Madrid* (380 U.S., at page 271):

> "But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing . . . has occurred."

More specifically pertinent to the point before us here is the following further language from *New Madrid* itself, not actually quoted by this Court in *Darlington,*

but certainly approved by implication (215 F.2d, at page 914):

> "And the Act affords no basis on which to order a person to reinstate employees in a business which he had . . . actually disposed of to another, and as to which he neither in law nor in fact possesses any power over the operations of his successor, either of management right in general or of labor relations control in particular . . . [citing *Southport Petroleum, supra*] . . . No more, in our opinion, can the Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing or abdicating sale of the enterprise."

The Court of Appeals for the Sixth Circuit affirmed these same rules in the more recent cases of *Makela Welding, supra,* and *Herman Pet Supply, supra.*

The foregoing lines of authority clearly would exonerate Golden State from further accrual of remedial liability past the time of the sale, whether for back pay accrual or reinstatement.

The Board decision herein, based on *Perma Vinyl,* held directly contrary, finding Golden State liable for "back pay" and "reinstatement" in the same breadth and extent as though the sale had never taken place. One may search the original decision in *Perma Vinyl,* in vain for any authority to support this aspect of the holding. Equally absent is any mention of the foregoing contrary authority.

The Court of Appeals, in its Opinion, expressly declined to comment on the propriety of the Board's Order in this respect on the basis that "Golden State had agreed to indemnify All American" for back pay

liability assessed against it and, since its Opinion confirmed All American's liability in this respect, Golden State would have to pay in any event. The court dismisses any further consideration of this subject by concluding that Golden State thus "concedes" such post-sale liability by virtue of its agreement, despite the fact that Golden State's very participation in this rather lengthy and costly proceeding demonstrates precisely that it concedes nothing of the sort.

There are several things wrong with the court's conclusion in this respect, both factually and legally. Principally, we may observe that it does not disturb or modify the Board's Order in any respect. Thus primary liability for remedial action post-sale has been adjudged against Golden State, jointly and severally with All American, regardless of whether Golden State might be secondarily liable to indemnify All American against losses as a consequence of private agreement.

The court is apparently saying that the existence of possible secondary liability moots the question of Golden State's primary liability since Golden State must pay in any event.

The two types of liability, however, are quite different, and the existence of one most assuredly does not moot the other, for each carries with it wholly different incidents. Golden State's liability to All American under its warranty can only be enforced by All American in the event of actual loss suffered by it, and any attempt by All American to recover on such an agreement would be subject to any valid defenses available to Golden State who, it must be remembered, is a major creditor of All American under the Purchase Agreement.

In other words, the existence of a secondary obligation to indemnify does not by any means assure that Golden State would have to pay in any event. On the other hand, the existence of primary liability does so assure, particularly if All American were to become insolvent. Furthermore, it guarantees that Golden State would be subject to the threat and sanction of contempt proceedings if it did not pay, and it strips away any defenses it might have against All American as well as any right to require the Board to proceed first against All American.

Further, the "Agreement" of which the court speaks, is nothing more than the obligation stemming from the warranty contained in the Purchase Agreement against pending litigation which, Crofoot acknowledged, would certainly entitle All American to indemnity if indeed it suffered any loss, in view of Golden State's oversight in failing to disclose the existence of these proceedings prior to the sale.[18] The foregoing makes it as clear as anything possibly could that the only thing Crofoot "agreed to" was the existence of an obligation to indemnify All American arising out of the warranty which had inadvertently been breached.

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[18]As noted above, the basis for the Trial Examiner's reference to such an indemnity obligation stems from the following testimony of Crofoot at the hearing: [App. 123] question: (by Mr. Barton) "During the course of your recent discussion with representatives of All American, did you or did you not agree to indemnify All American for whatever losses it might sustain as a result of these proceedings?" Answer: [Crofoot] "I discussed it with Mr. Schilling and told him that *I thought the contract covered our liability for any losses that might be sustained*, but that if it didn't, I would be happy to so guarantee." (Emphasis supplied). As we have pointed out above, the contract did in fact contain a warranty against pending litigation, whose breach would of course have given rise to an obligation to indemnify, and it is clearly this to which Crofoot is referring.

The foregoing demonstrates, Petitioners submit, that the Court of Appeals' rather blithe equation of Golden State's contingent and secondary liability to All American with the direct primary liability represented by its judgment of enforcement is quite without justification, and that the existence of the former possibility by no means moots the implacable certainty of the latter.

The Opinion also ignores the implications of holding the seller liable for the performance of an act, namely reinstatement, which it is incapable of performing. The absurdity of such a ruling is underscored by the Board's own holding that the offer of reinstatement made to Baker eleven months following the sale was invalid because, among other things, Golden State, having sold the bottling business, "had no such job" [App. Cert. 25].

B. The Application of Perma Vinyl to Fasten Unlimited Liability Upon All American, Both Retrospectively and Prospectively, Conflicts With Decisions of This Court and Those of Other Courts of Appeals and, Additionally, Constitutes a Denial of Due Process.

It is undisputed that All American was a bona fide purchaser of Golden State's soft drink bottling operation, that it was a stranger to the business, in no way identified with its predecessor and "in no sense an alter ego" [App. Cert. 8]. It is further undisputed that the sale was wholly bona fide, that it resulted in a genuine transfer of the seller's entire interest. It was not even suggested, therefore, that the transaction was collusive or entered into as a part of any scheme or plan to evade or frustrate the Board's original order.

In other words, All American was wholly innocent of wrongdoing; there was no evidence whatever of any conspiracy, fraud, evasion, or other ground for independent liability on its part. There existed, therefore, no basis or relationship, "which might of itself establish liability" against All American. *Regal Knitwear*, 324 U.S., at page 15.

Furthermore, All American was never made a party to the wrongful discharge proceedings and was provided no opportunity to participate in the litigation of that matter. To the contrary, it merely purchased the bottling business without assuming this liability from a seller which had warranted, in the Purchase Agreement, that no litigation pended.

Under settled principles, All American could not, thus, be held to answer for the unfair practices of Golden State. Nevertheless, the Supplemental Decision, and the Opinion in turn, fastened upon All American total liability, jointly and severally with Golden State, for reinstatement and "back pay" accruals, both before as well as after the sale.

The cited authorities were those discussed above: *Perma Vinyl*, *U.S. Pipe and Foundry* and *United Auto Workers*.

The proposed Order was drawn in the language of Rule 65(d) of the Federal Rules of Civil Procedure.[17] In *Regal Knitwear*, *supra*, this Court held that this Rule

[17]Federal Rules of Civil Procedure 65(d): *The Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

could not be used to extend the reach of the Board orders to "successors" or "assigns" who were innocent of a wrongdoing and against whom there existed no independent basis for adjudging liability. In so doing, the Court clearly excluded the notion that a purchaser, simply by taking with knowledge of a predecessor's peculations, could be held to answer in the same measure, if the sale were otherwise bona fide and the transfer of ownership genuine.

As stated by this Court in that case (324 U.S., at page 13):

> "The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not yet been adjudged according to law."

Even the language of the Act itself prohibits such an extension of liability. Section 10(c) thereof provides, in pertinent part, as follows:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in a complaint has engaged or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . ."

With this language in mind, the Board itself stated, in *Symms Grocer*, as follows:

> "Having re-examined the legal basis for its determination in the original decision herein that Idaho

[successor] was responsible for remedying the unfair labor practices of Symms, the Board now believes that it lacks any statutory authority to make any such determination. Section 10(c) of the Act empowers the Board to require unfair labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein." (34 LRRM, at page 1327).

This line of reasoning was again confirmed by the Board in its decision in *Eskin, supra.*

The Board reasoning in this respect finds its echo in the direct holdings of no less than three Circuits, each of which takes *Regal Knitwear* as the touchstone. One of the first to deal with the subject was the case of *Birdsall-Stockdale, supra,* where the court stated (208 F.2d, at page 237):

"While administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, the courts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

"Where successors and assigns are in active concert or participation with a defendant or respondent in the violation of an order, or are instrumentalities through which the defendant or respondent seeks to evade an order, they are brought within the scope of contempt proceedings by Rule 65(d), supra.

"Orders of the National Labor Relations Board are binding upon successors and assigns whose operations are 'merely a disguised continuance of the old employer.'. . .

"The Supreme Court, in the *Regal Knitwear* case, made it clear that those decisions were predicated, not merely on succession, but on a consideration of the relationship between the defendant and the successor which might *of itself* establish liability within the terms of Rule 65(d), a relationship not present in the instant case." (Emphasis supplied).

This position was echoed by the First Circuit in *Lunder Shoe, supra* (1954), and again by the Sixth Circuit in *Herman Bros. Pet Supply, supra* (1963), in which the courts held that if there was, in fact, a bona fide discontinuance and true change of ownership, the new owner would not be subject to the Board's order, and the duty of reinstatement thereby terminated.

As noted, it is undisputed here that there exists no independent basis for assessing liability against All American.

Opposed to this unbroken line of authority, *Perma Vinyl* stands virtually alone, except for the limited holding in *U.S. Pipe and Foundry,* the dictum in *United Auto Workers* and, finally, the square holding in the case at bar.

As we observed above, the Board, in the original *Perma Vinyl* decision, dealt with the wealth of authority opposing its conclusions by the simple expedient of ignoring it. It attempted to support its holding principally by reliance upon the decision of this Court in *John Wiley & Sons v. Livingston, supra,* a case having nothing

to do with unfair labor practices, but dealing instead with obligations which, as noted by the Court, not only were contractual and therefore consensual in origin, but were, additionally, mandatory by New York statutory law. *Wiley* was limited to a decision regarding a successor corporation's liability to arbitrate certain issues pursuant to the collective bargaining agreement executed by its predecessor. Its extension, by analogy, to the liability of a successor for the unfair labor practices of a predecessor, was specifically rejected by this Court, when the contention was advanced to it, in the case of *NLRB v. Burns International Security Service*, 406 U.S. 272, 32 L.ed. 2d 61, 92 S. Ct. 1571 (1972). The problem was dealt with in the following language (32 L.ed., at page 72);

> "We do not find Wiley controlling in the circumstances here. Wiley arose in the context of a § 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d). That decision emphasized 'the preference of national labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate, 'construed in the context of national labor law,' survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract. ID., at 549, 551, 11 L.ed. 2d at 904."

The Court went on to state, on the same page:

> "Its [*Wiley*] narrower holding dealt with the merger occurring against a background of state law which embodied the general rule that in merger

situations the surviving corporation is liable for the obligations of the disappearing corporation."

In other words, if *Wiley* itself did not make it quite clear, *Burns International Security Service, supra,* underscored the fact that *Wiley* was not authority for extending or even affecting settled principles regarding the liability of successors in unfair labor practice cases.

In this respect *Perma Vinyl* is also contrary to common law. See, for example, *Schwartz v. McGraw-Edison Co.*, 14 Cal. App. 3d 767, 92 Cal. Rptr. 776 (1971); *Kloberdanz v. Joy Mfg. Co.*, 288 F.Supp. 817 (D.C. Colo. 1968). This fact is quite significant when one realizes that *Wiley*, the only authority cited by the Board to support *Perma Vinyl*, was premised upon a statutory mandate of New York. In the case at bar, state law requires a result opposite to that reached in the court below.

The force of this authority (*Burns*) was quite apparent to Judge Kilkenny in the case at bar, who based his dissent to the portions of the opinion dealing with predecessor/successor liability squarely upon the authority of this decision, observing that it could not be reconciled with *Perma Vinyl.*

Even considered apart from the crushing weight of the authority opposing it, *Perma Vinyl* does not justify its own sweeping conclusions or assumption of authority, since the articulated policy considerations on which it rests cannot withstand analysis.

Preliminary to these, the Board acknowledges that the doctrine operates to impose liability upon a bona fide purchaser which was not a party to the unfair labor practices and which operates a business having

no connection with its predecessor [App. Cert. 10]. Nevertheless, by way of "balancing the equities," the Board invokes the following considerations:

1. We are not here concerned with designated individual employers; rather it is an "employing industry" that is sought to be regulated and brought within the Board's corrective and remedial powers.

2. When a new employer is substituted *in the employing industry*, there is no real change *in the industry*, so far as the victims of past unfair practices are concerned or the need for remedying those practices.

3. A need remains to erase the effects of those practices; only against the successor can the most effective remedial responsibility be imposed.

4. This works no hardship upon the successor, since he is the "beneficiary" of the unremedied, unfair practices!

Each of these conclusions falls apart upon closer examination. First off, one cannot sidestep due process requirements merely by lumping individual employers together and submerging their identities in an "employing industry." Such a broad brush sweeps every industry employer into the same hat, whether connected with the predecessor business or not. The logical extension of this reasoning would empower the Board to order remedial liability in respect of Baker against the Hires bottler or the Royal Crown bottler, or any other soft drink

bottler in Sacramento, or anywhere else for that matter.[18]

Furthermore, the grand assumption that a change of ownership represents no change at all is a wholly unfounded and unwarranted conclusion. Ownership is significant precisely because it is the fountainhead of control and therefore of policy and management attitudes. The very thing we are concerned with here is labor policy and the employer's attitude toward employee rights under the Act. Thus, a change of ownership is the most significant and fundamental possible change that could take place so far as impact upon labor relations.

The assumption underlying the Board's wholly unreal "no change" dogma is that a successor's labor attitudes and policy will, in every instance and respect, represent merely a continuation of the predecessor's and, presumably, that the successor therefore needs to be set straight as badly as did the predecessor. This is a complete *non-sequitur* and amounts to presuming the guilt of a wholly innocent party.

Nor does it follow at all that the erasure of past wrongs can only be accomplished by tarring the new employer with the stigmata of wrongdoing and requiring him to utter the customary *mea culpa* and assurances of future good conduct. Nothing could be better calculated to *revive* and *prolong* the miasmal effects of earlier wrongdoing than thus to identify the successor with the unfortunate practices of his predecessor.

Neither does it follow that the only proper remedy for past unfair practices is to be found against the suc-

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[18]The Board's assumption that it is authorized, in the first instance to "regulate" whole industries is highly debatable in itself. The Act only empowers it to assure that the labor policies of individual employers conform to its provisions.

cessor; in fact, the opposite is true: If any effective remedy is to be found, it is against the former employer within the limits imposed by his relinquishment of the business. If a successor employer refuses to bargain, supports a company union, wrongfully discharges, interrogates or otherwise coerces employees, or commits any other unfair labor practice, he is immediately and properly subject to Board proceedings and ultimate sanctions. However, the process of charge, proof and conviction cannot be dispensed with by simply running off a new copy of the old order and holding the new employer responsible under its terms. Such an expedient result is only gained at the total sacrifice of an innocent party's most fundamental rights, and to no really beneficial purpose.

Nor can it properly be said that the rights of an employee victim of unfair practices are prejudiced by a bona fide sale to any extent not present where unfair practices are totally absent. Mergers, sales, consolidations and other changes and reorganizations in the form of business are frequently entered into for the precise purpose of improving efficiency by eliminating duplicative costs and overlapping or excess positions. The consequent discontinuance of jobs in such situations is a relatively common business experience. *Perma Vinyl* would accord to the wrongfully discharged employee a degree of security in this respect which he would not otherwise have and which the Act nowhere purports to bestow.

What the Board is really saying, in its insistence upon "continuity," is that an employee, apparently, should at all events be protected against the consequences of change. As pointed out by this Court in *Burns, supra,* this runs counter to the most fundamental

attributes of a dynamic free economy which retains its vigor for the very reason that business organizations and business relationships are *not* static, but are constantly changing, developing and growing. The type of penalty which *Perma Vinyl* would fasten upon employers could only inhibit this healthy and ultimately beneficial activity by discouraging change and encouraging the sort of policies that lead only to stagnation.

In all of this, the Board is obfuscating a very pertinent distinction which it was first to draw, namely, that existing between cases involving representation and obligation to bargain and those involving employer unfair practices.

In the former, the considerations are wholly different, stemming, as they do, from a process in which it is the employees' action and theirs alone, which determines the representative with whom the employer must bargain. In the latter, however, the determinant is the conduct of the employer itself. Essentially, the employees have no control over the latter; the employer, properly speaking, exercises no control in the former.

It only makes good sense, then, that in cases involving the obligation to bargain, inquiry should be directed toward the identity of the unit before and after a change of ownership, for if the unit and its personnel remain unchanged, it should rarely be necessary to require a new expression of choice, particularly where a settled relationship has endured.

On the other hand, these criteria have no bearing on the question of a successor's liability for wrongdoing it did not commit, and it does not assist us, in sorting out the issues, to confuse the one situation with the other.

The successor employer is surely entitled to a fair chance to establish its own independent image with its new employees, and to articulate and demonstrate its own labor and management policies. To insist upon clothing an innocent successor with the stigmata of prior wrongdoing can only serve to repoison the atmosphere and frustrate enlightened endeavor. This, in return, can hardly serve to promote the best interests of the unit in question or the cause of industrial harmony. It simply rubs new salt in old wounds.

Petitioners urge that *Perma Vinyl* must not only yield to the weight of opposing authority, but that it must fall for lack of any sound or substantive basis in the first instance.

C. Perma Vinyl Is Inapplicable to Establish Liability Against All American in Any Event, Since the Essential Element of Knowledge Cannot, Consistant With Due Process, Be Established on This Record.

Even *Perma Vinyl* does not purport to hold a purchaser liable for remedial action where it takes with no prior knowledge of its seller's unfair labor practices.

In allowing this distinction, the Board seems to be acknowledging the force of *Regal Knitwear* by equating such knowledge with the type of "disguised continuance" which comes within the sweep of the *Regal Knitwear*_____, even though, a person can hardly become a wrongdoer simply because he has knowledge of the past wrongs of others.

In any event, the all important fact of pre-sale knowledge must be proved, and the General Counsel had the burden of proving it here, a burden which he failed to sustain. There is no affirmative evidence to show any preexisting knowledge on All American's part; on

the contrary, every bit of truly probative evidence in the case indicates otherwise.

Both Schilling and Crofoot, called by the General Counsel, testified positively that neither had mentioned the existence of any unfair practice charges or proceedings to any of the All American people at any time prior to the sale or, indeed, subsequently, until after the entry of the Court of Appeals decree in November, 1968. It was that event which revived the long dormant matter and rekindled recollection.

The contents of the Purchase Agreement itself bear them out: nowhere is this proceeding or possible liability mentioned, and the seller warranted that there was no pending litigation. To anyone familiar with the manner in which businesses are actually acquired, this fact alone argues almost conclusively against the existence of prior knowledge, for had All American known of the unfair practice proceedings prior to the sale, no conscientious attorney representing it would have permitted its signature on a document containing a warranty which it knew to be false.

The entire record touching the sale and all activity preceding it contains nothing to suggest the purchaser knew beforehand of the existence of the proceeding; additionally, the testimony of Crofoot and Schilling positively rules it out.

With this state of the record, Petitioners, on their case, did not feel it necessary to summon officers of All American all the way across the country from Rhode Island, merely to offer testimony cumulative to that of Crofoot and Schilling, particularly when the other evidence already in the record only supported Petitioners' contention, and the issue of knowledge was one on which they did not have the burden.

The Board, hard put to come up with a finding of knowledge in this absence of evidence to support it, hit upon an ingenious, if untenable, device. Largely on the basis of their post-sale conduct in putting their names to documents prepared for them by persons who were unaware that the sale had taken place and certain alleged "conflicts" in the testimony of Schilling and Crofoot,[10] the Board simply discredited the testimony of both witnesses completely. Having thus created a vacuum on the issue, so to speak, they filled it by raising an "inference" of knowledge on the basis of Petitioners' alleged failure to call officers of All American to testify on the point.

In other words, faced with the General Counsel's failure to carry his burden, the Board lifted it from his back and shifted it to Petitioners by taxing them in effect with a failure to rebut zero by corroborating, cumulatively, the favorable evidence already in the record.

This artifice was challenged before the court below, which evidently agreed with Petitioners, since it upheld the finding of knowledge on a different basis, without approving, or even mentioning the Board's spurious "inference."

The court observed that the Pepsi operation post-sale was substantially the same as it had been before and that Schilling, Golden State's manager of opera-

[10]It is asserted by the Board that both witnesses testified that Schilling played no part in the sale negotiations when, in fact, he had participated in at least one of the negotiating sessions. However, the record reveals that Crofoot himself testified (i) that Schilling had attended the first negotiating meeting and (ii) that Schilling had held individual private talks with the purchaser regarding its future status [App. 117-119]. Moreover, Schilling confirmed this [App. 164-165].

tions, was employed by All American in that same capacity following the sale. According to the court, this offered "substantial support" for the Board's finding of knowledge.

In other words, if a sale takes place, the operation is little changed in the process and the predecessor's manager is retained post-sale by the purchaser, then the purchaser, apparently *ipso facto*, may be charged with knowledge of all its predecessor's wrongdoings, whether it actually knew of them or not.

What the court seems to be saying is that All American's post-sale retainer of Schilling, who, of course, had knowledge of the unfair practice proceeding, will be imputed to All American and *ex post facto*, converted to pre-sale knowledge on the part of All American.

We confess that we find this leap even more difficult to follow than the Board's. Any knowledge attributed to All American on such a basis is, of course, a technical fiction and cannot take the place of actual knowledge. Since All American's retainer of Schilling commenced only with its acquisition of the business it had, by definition, to be post-sale. Any knowledge on the part of Schilling which, by imputation, might become All American's knowledge, therefore, could only occur as of the time when Schilling came on All American's payroll, *i.e.*, also post-sale. By no stretch of any rational imagination can this be called pre-sale knowledge except, perhaps, by giving retroactive effect to it—something which mocks the facts and offends the most fundamental notions of fairness. Such technicalities and devices are not appropriate to our concepts of justice.

It does not require great perception to appreciate that there could be no such thing as a *bona fide* purchaser if this type of reasoning were extended logically, let alone carried out to its extreme. Any person acquiring a business would invaribly and inevitably be tainted, *ex post facto,* by the knowledge of the personnel employed prior to the sale and retained by him afterward. Such a policy would, at the least, put a premium on wholesale discharge, at least of supervisory personnel, in the event of an acquisition, and the staffing of management positions only by those untainted with any prior knowledge that might be imputed to a successor.

Arbitrary devices such as those used by the Board and the court below have long been recognized as being manifestly unjust and a violation of due process. In the case of *Western & A. R. Co. v. Henderson,* 279 U.S. 639, 73 L.ed. 884, 49 S. Ct. 445 (1928), this Court dealt with a Georgia statute imposing liability on any railroad company for damages done to persons or property by its trains unless the company proved that it exercised all ordinary and reasonable care and diligence. The plaintiff recovered under this statute by simply proving that her husband was killed in a collision with defendant's train. She offered no other evidence, although the defendant railroad offered much evidence tending to show that it and its employees exercised due care.

In finding this Georgia statute unconstitutional, this Court stated on page 624 as follows:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a

rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

In holding this statute to be unconstitutional, the court distinguished a former case which upheld an inference of negligence against a railroad company in similar circumstances by pointing out that this inference disappeared with the introduction of any testimony to the contrary while, in the *Western* case, the Georgia statute created an inference that was given the effect of evidence to be weighed against the opposing testimony, and which was to prevail unless such opposing testimony was found by the jury to preponderate.

In relation to this aspect of the law, also see *Manley v. State of Georgia,* 279 U.S. 1, 6, 73 L.ed. 575, 578, 49 S. Ct. 215 (1928).

The applicability of these cases to the situation before us is clear. There is no rational connection between the fact that All American did not appear to corroborate testimony already given on a matter on which it did not carry the burden and the finding that it had pre-sale knowledge. Furthermore, there is no rational connection between the fact All American retained knowledgeable personnel and the finding that it had pre-sale knowledge.

Moreover in this case, these devices are without even the color of legislative sanction to support them. They were simply plucked from thin air. Clearly such devices must violate the due process principles established in *Western* and *Manley*.

From the foregoing it is evident that the General Counsel failed to establish the existence of All American's pre-sale knowledge of the past unfair practices, which is fundamental to the application of *Perma Vinyl*.

II.

The Scope of the Remedial Order Affirmed and Enforced Below Exceeded the Powers Granted to the Board by the Act.

In the remedial aspect of the Supplemental Decision, as confirmed by the Court of Appeals, the Board erroneously exceeded its power in three respects: (a) it ordered remedial action past the time when Baker, as specifically found, would have terminated his employment relationship; (b) it ordered the employer to "re-instate" an employee into a non-employment situation, *i.e.*, an independent business; and (c) it ordered an employer to pay, under the guise of a "back pay" order, not lost wages, but anticipated profits of an independent business.

As to the first item, the decision represents a violation of doctrine created by the Board itself; the latter two items are conceded by the General Counsel to be matters of first impression.

The resolution of these issues inevitably revolves around the character of the several independent distributorships which replaced the former "house routes"

in the course of Golden State's conversion program which commenced on 1 October 1964. Petitioners throughout have contended that these distributorships were independent businesses and that the distributors themselves were independent contractors, and they offered abundant evidence in support of this contention.

This evidence showed, without contradiction, that the distributors were sub-contractors or sub-franchisees each operating within territories defined by the contracts executed between them and Golden State. Under the terms of these contracts, the distributors purchased products from Golden State which they resold to customers within their territories. They did not earn wages from anyone; if they made money at all, it was by realizing net profits after the deduction of their operating expenses, inventory costs, and so on.

The distributors were responsible for furnishing their own equipment, hiring and paying whatever manpower they needed, and bearing all risk of loss, including the risk of collection.

The distributors were not subject to supervision, were under no restrictions whatever regarding hours of work or *modus operandi*. Their contracts merely specified a certain level of performance in terms of volume, and so long as this criterion was satisfied, their basic contract obligation was fulfilled.

The Trial Examiner found, as facts, all of these fundamental incidents and, at the same time, recognized and found that they spelled out a relationship of independent contract in the following language:

> "Respondent began converting its driver-salesmen to distributors, or *independent contractors*, by of-

fering each of them . . . contracts as distributors, or *independent contractors*, under the terms of which they realized net profits, after the deduction of their operating expenses, from the purchase of the products from Golden State and the resale to customers . . ." [App. Cert. 17]. (Emphasis added).

The General Counsel throughout stoutly maintained that it was irrelevant to the case whether the distributors were considered independent contractors or employees.[20] The reason for this is apparent if thought through: to take a position on the issue would be a concession that the point did indeed have significance and, in turn, to admit, tacitly, if not actually, that the Board's action could be sustained only by finding the distributors to be employees, rather than independent contractors and the emoluments attaching to their positions to be incidents of the employer-employee relationship.

The Trial Examiner, following the General Counsel's lead, also remarked that such finding was really unnecessary [App. Cert. 21-22]; but only after having

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[20]The General Counsel stated: "Our position will be that whether or not these individuals were independent contractors is really irrelevant insofar as the standpoint of remedy for Mr. Baker's discharge is concerned. We would certainly concede that if Mr. Baker has [sic] been an independent contractor at the time of his discharge, there would have been no violation, but since there is no such contention, our position is that it is really not relevant. We are talking about remedy here, not the scope of violation." [App. 104-105].

After Jackson read into the record certain proposed testimony of Schilling relating to the status of the distributor, the General Counsel stated: "I would be willing to stipulate that Mr. Schilling would so testify. I would object to the relevancy of the testimony." [App. 239].

found that the distributors were, indeed, independent contractors, as noted above.

With the foregoing in mind, we turn to an examination of the three specific issues posed above.

A. It Was Error for the Board to Impose Remedial Liability Beyond That Date When Baker Would Voluntarily Have Terminated His Employment With Golden State.

While Golden State originally disputed the General Counsel's contention that Baker would have been offered a distributorship at all, the Trial Examiner and the Board found against it on that issue and held that as of 1 October 1964, Baker would have been offered, and would have accepted, a distributorship. As earlier indicated, this finding had evidentiary support in the record and is, therefore, not disputed here.

This finding, in turn, compels the further finding that, since Baker went into business for himself on that date, his employment by Golden State terminated at the same time, voluntarily and automatically.

In *Mastro Plastics Corp.*, 136 NLRB No. 119, 50 LRRM 1006 (1962), the Board held that an employer's liability for reinstatement and further back pay accruals cease to run beyond the date on which the distriminatee would voluntarily have left the company's employ. In that case, the Board said, at pages 1009-1010:

> "Only if the evidence supports a finding that the claimant would have left Respondent's plant . . . in order to obtain this particular new job is his claim from that time disallowed. *A claimant who goes into business on his own is treated similarly to one who obtains interim employment.*" (Emphasis supplied).

Mastro Plastics was enforced in 354 F.2d 170 (2nd Cir. 1965) and Certiorari was denied by this Court (384 U.S. 972).

The Board's and the court's decisions in the case at bar purport to fasten upon both Petitioners' remedial liability extending well past this clearly defined cutoff point in direct conflict with Board enunciated and court approved doctrine. We urge that this error alone requires reversal.

A resolution of this issue in accord with the rule of *Mastro Plastics* would definitively resolve, by mooting, all other issues tendered in this case, since questions of successorship and other aspects of remedial liability would never be reached, this event having antedated the sale by over three years.

B. The Board Exceeded Its Power in Purporting to Order Petitioners to "Reinstate" Baker Into a Nonemployment Situation by Establishing Him in an Independent Business.

On December 11, 1968, within fifteen days following the final determination that Baker's discharge constituted an unfair labor practice, Mr. G. Schilling, "President" of All American's Sacramento Pepsi Division, conveyed an offer of reinstatement to Baker [App. 91]. In so doing, Schilling was attempting to comply with the Board's Order which required him to:

> ". . . offer Baker immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings occasioned by such discrimination by payment to him of a sum of money equal to that which he would normally have earned from the date of such discrimination until the date of reinstatement, less his net earnings during that period." [App. Cert. 1-2].

It is not disputed that this offer was transmitted by Schilling upon the recommendation of Jackson, who, at that time, was still unaware that the business had been sold to All American or that Schilling was then in the latter's employ. The Board argued that because of this fact, the offer was, in fact, extended on behalf of Golden State and therefore abortive.

Whatever the dubious merits of this contention, the fact is that the letter, on Sacramento Pepsi's stationery, made a perfectly unequivocal offer of reinstatement to Baker as a driver-salesman with that company. As such, it could unquestionably have been enforced against the company by Baker, whatever Schilling's subjective thoughts may have been at the time he signed it.

Be all this as it may, however, the Board held the offer invalid on the additional ground that reinstatement as a driver-salesman was insufficient in any event since, but for the discrimination, Baker would have become an independent distributor. It therefore held that Baker must be given a distributorship.

In support of this novel conclusion, the Board cited cases holding to the general effect that where, but for the unfair labor practice, a discriminatee would have received a promotion to, say a foreman's job, he must be offered reinstatement as a foreman and his back pay calculated accordingly.[21] The Court of Appeals, supporting its affirmance of the same conclusion, cited a

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[21] *International Union of Operating Engineers, Local 925 (J. L. Manta Inc., et al.)*, 180 NLRB No. 117 (1970); *Mooney Aircraft, Inc.*, 156 NLRB 326, enf'd 375 F.2d 402 (5th Cir. 1967); *Gainsville Publishing Company*, 150 NLRB 602 (1964); and *East Texas Steel Casting Company, Inc.*, 116 NLRB 1336, enf'd 255 F.2d 284 (5th Cir. 1958).

similar case: *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236-237 (2nd Cir. 1953).

Petitioners have no quarrel with any of these cases. They are, however, quite inapposite here. The essential matrix for each of them was the employment relationship—in which the Respondent, as the employer, continued to administer employment policy and pay wages, on the one hand, and the discriminatee continued on, without further interruption, as an employee, albeit in an improved situation.

None of these cases dealt with or considered the implications of a situation where the "promotion" or the improvement would necessarily have severed this relationship and terminated, at the same time, all basis for jurisdiction under the Act. Relationships between independent employees are beyond the powers of the Board because they are outside the scope of the Act, which is confined to matters arising out of the employer/employee relationship. This is evident from the outset by the declaration of policy which states:

> " 'It is the purpose and policy of the Act . . ., to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, . . .' "

Furthermore, Section 10(c) of the Act, in enumerating potential remedies, states that persons committing unfair labor practices may be required to cease and desist from such practices and to take such affirmative action including reinstatement of employees, etc., etc. The very use of the term "reinstatement" in conjunction with the word "employee" implies a return of an employee to his former relationship with his employer, namely that of employment.

The Order, as actually rendered in this matter (see above), is couched in the customary language and, as such, conforms with the language of 10(c), and the offer of reinstatement as actually extended to Baker is in literal satisfaction of that Order as formulated. It is only the Board's interpretation, as confirmed by the Court of Appeals, of what is required to satisfy that Order that takes us into the extra-legal realms described above. Literally, if Petitioners had attempted to conform with the Order by offering Baker a distributor's contract, this would not have complied with the Order, since it offered him no position of employment with Golden State.

The General Counsel conceded [App. 104-105], that the Act's reach did not extend to this relationship, since, had the unfair practices here charged been committed with respect to a distributor, there would have been no violation. From this it follows that the remedy attempted here could be set totally at naught, by any respondent so minded, by executing with a discriminatee, in obedience of the Board's mandate, a distributorship agreement and, a few days following, annulling it. Whatever contractual liability might flow from this breach, it concededly could not be styled an unfair labor practice.

Furthermore, remedial liability could also be avoided by a number of possible arrangements which would leave Golden State without the right or authority to pick and choose individual distributors as it pleased.

These considerations are not raised to suggest avenues of escape for reluctant wrongdoers; they are cited, rather, to emphasize the fundamental incongruity, even absurdity, of what the Board has attempted

to do in this case and its total unsuitability, legally and practically speaking, to the situation at hand.

The dissenting opinion of Judge Kilkenny recognized this defect and concluded that the Board's proposed action exceeded its power. Petitioners urge the same view to this Court.

C. The Board Exceeded Its Power in Ordering Petitioners to Pay, Ostensibly as "Back Pay" Consequential Damages Based on Alleged Loss of Anticipated Profits of a Business.

What we have said in the sections immediately preceding applies with equal force to the "back pay" aspects of the Order enforced below. As interpreted by the Board and court, this Order required Petitioners to pay to Baker, for periods subsequent to 1 October 1964, not lost wages or pay which he might have earned as an employee, but rather, anticipated profits which he allegedly would have earned as a distributor.

This, of course, is not reimbursement for back pay; it is an assessment of liability for consequential damages, based upon anticipated, and wholly speculative profits which might have been earned in a hypothetical business never commenced, by a person without prior business experience.

This Order and the Opinion enforcing it are matters of first impression.

No special authority is cited to sustain this novel and remarkable conclusion other than the standard authority contained in the Act itself relating to back pay awards[22] and cases decided pursuant to that unquestioned authority.

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[22]Section 10(c) of the Act, 29 U.S.C. 160(c):

"... the Board ... shall issue and cause to be served on such person an order requiring such person to cease and

Both the Board and the court have avoided coming to grips with other authority which articulates the reasons why the Board is without power to order such relief.

In the landmark case of *Isis Plumbing and Heating Co.*, 138 NLRB No. 97, 51 LRRM 1122 (1962), a majority of the Board, in developing a rationale to justify the payment of interest in back pay awards, emphasized (51 LRRM, at page 1124):

1. That the remedy of back pay may not be considered as being punitive, or in the nature of a fine or penalty imposed against an employer;
2. That it is, rather, based upon the concept of *indebtedness* arising out of an obligation imposed by statute, and
3. As an incident fixed by law to the *employer/employee relationship.*

The foregoing clearly excludes not only damage awards, but anything not incident to the employer's obligation to the employee for *wages*. In the case at bar, the sums which Petitioners are ordered to pay have nothing to do with any wage obligation or employment relationship at all.

In the same *Isis Plumbing* case, the two dissenting members of the Board were at pains to point out (51 LRRM, 1125, *et seq.*) that the term "back pay" as used in the Act was a term of art, and represented a deliberate choice on the part of the Congress between competing policies. In adopting the mentioned language, Congress specifically rejected alter-

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desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back *pay*, as will effectuate the policies of this act. . . ." (emphasis added)

native proposals which would have had the effect of giving the Board the much broader power of awarding compensatory or consequential damages.

In other words, the very use of the term "back pay" is a limitation to what the term implies, namely the reimbursement of lost wages, and nothing more.

It is also clear that Congress deliberately intended to withhold from the Board any power to order remedies stemming from non-employment relationships and excluded it from any authority to award damages.

As the language of Section 10(c) plainly says, it is authorized to order reinstatement of employees with or without back pay, that is to say, it is authorized to order them restored to *employment*, and having so said, it has clearly excluded the notion that it is authorized to order them reinstated to non-employment situations or compensated for anything other than lost wages.

The legislative history illuminated by the minority in *Isis Plumbing* merely emphasizes the applicability of the familiar rule, *"expressio unius est exclusio alterius."*

It is equally clear that the court below was of two minds on the subject, since one of the cases cited by Judge Kilkenny in his dissenting opinion, *Brown v. NLRB, supra*, emphasizes the impact upon this issue of the fact that the distributorships were independent businesses and the distributors themselves independent contractors.

The Board's Order and the Opinion itself, in this respect, are equally offensive to settled concepts of damages in the common law, even were that context appropriate, since the damages awarded were wholly speculative, being profits allegedly anticipated from a "start-up" business with no prior operation or earnings history whatever. See, for example, *Macmorris Sales Corporation v. Kozak*, 263 Cal. App. 2d 430, 69 Cal. Rptr. 719 (1968); *Handley v. Guasco*, 165 Cal. App. 2d 703, 322 P. 2d 354 (1958).

The validity of these concepts is underscored by the fact that in the instant case, two of the driver-salesmen who became independent distributors for Golden State went bankrupt [Tr. 271-273], while two other driver-salesmen who accepted distributorships, later asked for and obtained back their former positions as driver-salesmen for the reason that they had been unable to make a go of it as distributors [Tr. 272].

In any event, the Board's attempt to enforce its Order in this manner is, Petitioners urge, erroneous and unlawful.

Conclusion.

Petitioners submit that the Opinion and Judgment of the court below be reversed and remanded with instructions to enter judgment against Petitioner Golden State Bottling Company for the back pay Baker would have earned as a driver-salesman in Golden State's employ from the date he was wrongfully terminated through October 1, 1964. In the alternative, if this court is not

disposed to accept Petitioner's argument in regard to Baker's voluntary termination of employment, Golden State should be ordered to pay to Baker back pay he would have earned as a driver-salesman in Golden State's employ from the date of this wrongful termination until the date of sale of the bottling company by Golden State, Jnuary 31, 1968. In either instance, enforcement as against All American should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

GOLDEN STATE BOTTLING COMPANY, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	2
A. Background	2
B. The present proceeding	5
C. The decision of the court of appeals	9
Summary of argument	10
Argument	15
I. The Board properly found that All American was a successor employer for purposes of the National Labor Relations Act and that it acquired Golden State's business with knowledge that Golden State had unlawfully discharged an employee and had failed to remedy that unfair labor practice	16
A. All American is a successor employer for purposes of the National Labor Relations Act	16
B. Substantial evidence supports the Board's finding that All American acquired Golden State's business with knowledge of Golden State's unremedied unfair labor practices	18
II. A successor employer who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the National Labor Relations Act and has failed to remedy that unfair labor practice may be required to reinstate the employee with back pay	21

508-527—73——1

Argument—Continued Page

A. The Board has authority under Section 10(c) of the Act to issue remedial orders encompassing a successor employer who acquires the employing entity with knowledge of the predecessor's unremedied unfair labor practice 22

B. Rule 65(d) of the Federal Rules of Civil Procedure does not bar the Board from requiring a successor employee to remedy its predecessor's unfair labor practices 30

III. The Board properly made Golden State jointly liable with All American for back pay accruing after the sale 34

IV. The Board properly determined the amount of back pay due the unlawfully discharged employer and ordered that he be reinstated as a distributor 38

Conclusion 42

Appendix A 43

Appendix B 44

CITATIONS

Cases:

Alexander Milburn Co., 78 NLRB 747 8

Behrens v. *Skelly*, 173 F. 2d 715 31

Darlington Mfg. Co. v. *National Labor Relations Board*, 397 F. 2d 760, certiorari denied, 393 U.S. 1023 ..... 25, 37

Interstate Circuit, Inc. v. *United States*, 306 U.S. 208 21

Interstate Commerce Commission v. *Western N.Y. & P.R. Co.*, 82 Fed. 192 ..... 3, 32

Cases—Continued

	Page
John Wiley & Sons v. *Livingston*, 376 U.S. 543	8, 13, 28, 29, 30
J. R. Clark Co. v. *Jones & Laughlin Steel Corp.*, 186 F. Supp. 22, affirmed, 288 F. 2d 279	32
Local 761, Int'l Union of Electrical Workers v. *National Labor Relations Board*, 366 U.S. 667	8
Lucy v. *Adams*, 224 F. Supp. 79, affirmed *Sub nom. McCorvey* v. *Lucy*, 336 F. 2d 892	32
Mastro Plastics Corp., 136 NLRB 1342	39
Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270	12, 22
McCann Steel Co., 203 NLRB 115, 83 LRRM 1175	39
Nathanson v. *National Labor Relations Board*, 344 U.S. 25	37
National Labor Relations Board v. *Bell Aircraft Corp.*, 206 F. 2d 235	40
National Labor Relations Board v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234	34
National Labor Relations Board v. *Brown & Root, Inc.*, 311 F. 2d 447	41
National Labor Relations Board v. *Burns*, 406 U.S. 272	10, 16, 17, 29, 32
National Labor Relations Board v. *Charley Toppino and Sons*, 385 F. 2d 94	41
National Labor Relations Board v. *Dorn's Transportation Co.*, 405 F. 2d 706	21
National Labor Relations Board v. *East Texas Steel Castings Co.*, 281 F. 2d 686	41
National Labor Relations Board v. *Lion Oil Co.*, 352 U.S. 282	22
National Labor Relations Board v. *Missouri Transit Co.*, 250 F. 2d 261	37

Cases—Continued

Page

National Labor Relations Board v. *Mooney Aircraft Inc.*, 375 F. 2d 402, certiorari denied, 389 U.S. 859 41

National Labor Relations Board v. *Rice Lake Creamery Co.*, 365 F. 2d 888 41

National Labor Relations Board v. *Wallick*, 198 F. 2d 477 21

Packard Motor Car v. *National Labor Relations Board*, 330 U.S. 485 8

Perma Vinyl Corp., 164 NLRB 968 ..... 7, 8, 12, 21, 24, 25, 29, 33

Phelps Dodge Corp v. *National Labor Relations, Board*, 313 U.S. 177 ..... 13, 22, 23, 36

Radio Officers' Union v. *National Relations Board*, 347 U.S. 17 38

Regal Knitwear Co. v. *National Labor Relations Board*, 324 U.S. 9 ..... 12, 14, 23, 24, 30, 31, 35

Rivera v. *Lawton*, 35 F. 2d 823 32

Rodman v. *Rogers*, 109 F. 2d 520 32

Southport Petroleum Co. v. *National Labor Relations Board*, 315 U.S. 100 ..... 23, 24

Symns Grocer Co., 109 NLRB 346 8

Textile Workers v. *Darlington Mfg. Co.*, 380 U.S. 263 ..... 14, 36

Thomas Engine Corp., 179 NLRB 1029, affirmed *sub nom. United Automobile Workers* v. *National Labor Relations Board*, 442 F. 2d 1180 ..... 20, 27

United Gilpin Corp. v. *Wilmore*, 100 Colo. 453, 68 P 2d 34 31

United States v. *Dean Mfg. Co.*, 71 F. Supp. 96 31

United States Pipe and Foundry Co. v. *National Labor Relations Board*, 398 F. 2d 544 ..... 12, 21, 25, 26, 27

Cases—Continued Page

Virginia Electric & Power Co. v. *National Labor Relations Board*, 319 U.S. 533 23

Walling v. *Reuter*, 321 U.S. 671 33

Wirtz v. *Ocala Gas Co.*, 336 F. 2d 236 20

Wright v. *County School Board*, 309 F. Supp. 671, affirmed, 407 U.S. 451 32

Statutes, Regulations and Rule:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2, 43

Section 2(3) 39, 40

Section 7 ..... 25, 30

Section 8(a)(1) 3, 43

Section 8(a)(3) 3, 36, 43

Section 8(a)(5) 36

Section 8(d) 29, 30

Section 10(c) 12, 21, 22, 23, 24, 43

Labor Management Relations Act 61 Stat. 156, Section 301, 29 U.S.C. 185 28

29 C.F.R. 102.52–102.54 5

Federal Rules of Civil Procedure, Rule 65(d) 13, 14, 21, 30, 31, 33, 34, 43

Miscellaneous:

Comment, *Successor Employer's Obligation to Remedy Unfair Labor Practices*, 68 Colum. L. Rev. 1602 (1968) 21

Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L.Rev. 735 (1969) 21

ALI, *Restatement of Law—Judgments* § 89 (1942) 31

Cases—Continued

Page

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-36) is reported at 467 F. 2d 164. The supplemental decision and order of the National Labor Relations Board (Pet. App. 1-31; A. 56-59)[1] are reported at 187 NLRB 1017.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37-38) was entered on August 21, 1972. The petition for a writ of certiorari was filed on November 8, 1972, and granted on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "A." refers to the separate Appendix to the Briefs.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Federal Rules of Civil Procedure are set forth in Appendix A, *infra*, p. 43.

QUESTIONS PRESENTED

1. Whether the Board properly found that All American was a successor employer for purposes of the National Labor Relations Act and that it acquired Golden State's bottling business with knowledge that Golden State had unlawfully discharged an employee and had failed to remedy that unfair labor practice.

2. Whether a successor employer who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the National Labor Relations Act and has failed to remedy that unfair labor practice may be required to reinstate that employee with back pay.

3. Whether the Board properly made Golden State jointly liable with All American for the backpay due the unlawfully discharged employee.

4. Whether the Board properly determined the amount of back pay due the unlawfully discharged employee and ordered him reinstated as a "distributor."

STATEMENT

A. BACKGROUND

Golden State Bottling Co., Inc. (hereafter "Golden State" or the "predecessor") operated a soft drink bottling plant and sold and distributed soft drinks at wholesale under the name of "Pepsi-Cola Bottling Co.

of Sacramento" (147 NLRB 410, 415).[2] On June 10, 1964, the Board found that Golden State violated Section 8(a) (3) and (1) of the National Labor Relations Act by discharging Kenneth L. Baker, a driver-salesman, on August 16, 1963, because of his union activities. The Board ordered Golden State and its officers, agents, successors, and assigns to offer Baker immediate and full reinstatement to his former or substantially equivalent position, and to make him whole for any loss of earnings from the date of his discriminatory discharge until the date of his reinstatement (147 NLRB 410). On December 2, 1965, the court below enforced the Board's order with respect to Baker. 353 F. 2d 667.[3]

Late in 1964, several months after the Board's decision, Golden State decided to convert its most capable driver-salesmen to distributors.[4] On October 1, 1964, Golden State offered the first distributorship contract to Donald Thorne, who was then its most successful driver-salesman and had been third in sales while Baker

[2] Golden State had other business interests in addition to the bottling business (A. 124).

[3] However, due to a delay in the court's disposing of the Board's petition for rehearing on a portion of the court's decision unrelated to Baker, a final decree was not entered until November 27, 1968 (A. 57; 401 F. 2d 454).

[4] Under the terms of their contracts, instead of receiving the salary and commission previously paid to them as driver-salesmen, the distributors purchased the products from Golden State at a discount and realized, as net profit, the difference between this and other costs and the resale price to the customers. Golden State also enlarged the previous routes of the salesmen to include several high-volume stops in the distributors' routes (Pet. App. 17). The salesmen offered distributorships were given the option of remaining as driver-salesmen (Pet. App. 18).

508-527—73——2

was employed (Pet. App. 17–18; A. 153, 214). By January 1968, Golden State had converted 12 of its 18 salesmen to distributors (Pet. App. 18–19; A. 153–159).

On January 31, 1968, Golden State sold the bottling company and all of its assets to All American Beverages, Inc. (hereafter "All American" or the "successor") as a going concern (Pet. App. 6; A. 60–80). All American continued the bottling business in the same plant at the same location, without any hiatus or alteration in the method of operation. All American acquired the machinery, buildings, accounts receivable, trade name, and real estate of Golden State's bottling business, as well as a covenant by Golden State's principals not to compete with All American. All American employed all but 2 or 3 of Golden State's approximately 50 employees. The contracts of all of the 12 distributors were assigned to All American, and they continued to sell the same products to the same customers. All of Golden State's supervisory and managerial personnel continued to work for All American, including Eugene Schilling, Secretary and general manager of Golden State, who was hired by All American as general manager and "president" of the bottling operation (Pet. App. 8–9; A. 60–81, 85–87, 132, 138–142, 143–144, 240–241). In his managerial capacities for All American, Schilling continued to direct the daily operations of the bottling company in the same manner as he had for Golden State (Pet. App. 5–6; A. 132, 168–169).

B. THE PRESENT PROCEEDING

Unaware of the sale to All American, the Board's Regional Director served on Golden State a back pay specification[5] on September 30, 1969, detailing the amount of back pay accrued to Baker from the date of his unlawful discharge on August 16, 1963,[6] to June 30, 1969 (A. 1–6). In its answer to the back pay specification,[7] dated November 19, 1969, Golden State made no mention of the sale of the bottling company to All American 21 months earlier, but, rather, asserted that it had validly offered Baker reinstatement on December 11, 1968 (A. 7–12).[8] The Regional Director thereafter learned of the sale to All American, and, on December 19, 1969, he issued a new back pay specification which was served on both Golden State and All American and named the latter as a successor to Golden State within the meaning of the Board's original order (A. 14–35).

In their answer to the new back pay specification, Golden State and All American admitted that, in January 1968, the business had been sold to All Amer-

[5] See 29 C.F.R. §§ 102.52–102.54.

[6] Baker was discharged by Eugene Schilling. 147 NLRB at 418.

[7] The answer was verified, "under penalty of perjury," on November 24, 1969, by E. J. Crofoot, as president of Golden State (App. B, *infra*, pp. 44–45).

[8] The offer was made by Schilling, as "President" of "Pepsi-Cola Bottling Co.," on December 11, 1968 (A. 91). The answer to the original back pay specification indicates that the offer was made on behalf of Golden State (A. 7). At that time, Schilling no longer had any authority to represent Golden State, and the latter, having sold the business, was in no position to offer Baker his former job (Pet. App. 14, 24–25; A. 196–197).

ican, but denied that All American was liable for any back pay and denied that Golden State was liable for back pay after the January 1968 sale of the bottling business to All American (A. 38–46). The case proceeded to hearing before a Trial Examiner, with Golden State and All American participating through counsel (Pet. App. 4; A. 103–104). Based upon the evidence adduced at the hearing, the Examiner found, and the Board agreed,* that:

1. Although All American "was a bona fide purchaser for value unconnected with Golden State," it had, on and after January 31, 1968, continued the bottling business of Golden State without interruption and without substantial change in method of operation, employee complement, or supervisory and managerial personnel; thus All American was a successor employer for purposes of the Act (Pet. App. 8–9).

2. All American had knowledge, at or before the date of the transfer of operations, of the Board's unfair labor practice proceeding against Golden State (Pet. App. 16–17). In making this finding, the Examiner relied on the fact that none of the officials of All American appeared as witnesses during the back pay hearing to deny knowledge, nor was their absence explained (Pet. App. 16). The Board, accepting the Trial Examiner's ruling, discredited the denials of Schilling and Golden State's president, Crofoot, that they had advised All American of the Board's unfair

*The Board adopted the findings, conclusions, and recommended order of the Examiner (A. 58).

labor practice decision prior to the transfer (Pet. App. 13, 16).[10]

The Board followed its decision in *Perma Vinyl Corp.*, 164 NLRB 968, in which it had held that a successor who acquires a business with knowl-

[10] The Examiner stated that Schilling and Crofoot had attempted to conceal the transfer to All American from both the Board and the court of appeals (Pet. App. 13–14). The Examiner noted that, in November 1968, Schilling signed a letter and substitution of attorneys, which was sent to the court below 9 months after the bottling business had been sold and Schilling's employment with Golden State had ended, as "General Manager" of "Golden State Bottling Company" (Pet. App. 13–14, A. 82–84). A month later Schilling, as "President" of "Golden State Bottling Company," executed the notice to employees required by the Board's order and sent a certified copy of the notice to the Board (Pet. App. 14, 24; A. 92–95). At the same time Schilling made an offer, on behalf of Golden State, to reinstate Baker as a driver-salesman (see p. 5, n. 8, *supra;* Pet. App. 14, 24–25). Similarly, the Examiner noted that Crofoot, on November 24, 1969, 21 months after the sale, verified Golden State's answer to the original back pay specification, which alleged that Golden State had offered reinstatement to Baker on December 11, 1968 (Pet. App. 14; p. 5, n. 7, *supra*).

The Examiner further found that, while Crofoot testified that he "hadn't remembered" the unfair labor practice case when asked by All American concerning pending litigation, Crofoot was responsible for settling all legal matters involving Golden State, and he had authorized the payment of substantial legal fees in connection with that case (Pet. App. 14–15; A. 107–109, 111, 114–115, 129). Finally, the Examiner found that, while both Schilling and Crofoot testified that Schilling played no part in the sale negotiations, their further testimony revealed that Schilling had participated in at least one of the negotiating sessions during which his own future with All American was discussed, met with an All American "operations man" on another occasion, and executed the sales contract as secretary of Golden State (Pet. App. 15; A. 72, 117–119, 163–168).

edge of his predecessor's unfair labor practice is responsible for remedying his predecessor's unlawful conduct (Pet. App. 10).[11] It issued a supplemental order requiring All American to offer Baker reinstatement as a distributor,[12] and, jointly and severally with Golden State, to pay Baker $16,497, with interest, as net back pay due for the period ending December 31, 1968, plus an undetermined amount of back pay from January 1, 1969, to the date of a vaild offer of reinstatement (Pet. App. 29).

The amount of Baker's back pay consisted of what he would have earned as a driver-salesman from August 16, 1963, the date of his unlawful discharge, to October 1, 1964, plus earnings as a distributor after that date until a valid offer of reinstatement is made to Baker, less his interim earnings. The Board found that, but for the unlawful discrimination against him, Baker would have been offered, and would have accepted, a distributorship contract on October 1, 1964

[11] The Board first imposed a back pay and reinstatement remedial obligation upon a *bona fide* successor in *Alexander Milburn Co.*, 78 NLRB 747. In *Symns Grocer Co.*, 109 NLRB 346, the Board reversed *Millburn*. However, further experience with the problem and the light cast upon it by this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (*infra*, pp. 28–30), led the Board, in *Perma Vinyl*, to return essentially to its original position. Cf. *Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 674; *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 492–493.

[12] The Board found that Schilling's December 1968 offer, on behalf of Golden State, to reinstate Baker as a driver-salesman was invalid, since Baker was entitled to reinstatement as a distributor, and Schilling had no authority to act for Golden State at that time (Pet. App. 24–25; p. 5, n. 8, *supra*).

(Pet. App. 19–20).[13] The Board calculated Baker's earnings as a distributor from the earnings of Donald Thorne, the employee most comparable to Baker in total sales prior to Baker's unlawful discharge (Pet. App. 21–23; A. 17, 25–26).

C. THE DECISION OF THE COURT OF APPEALS

A divided court of appeals enforced the Board's supplemental order (Pet. App. 32–36). The court sustained the Board's findings that All American was a successor employer to Golden State, and that All American took over the bottling company with knowledge of Golden State's unfair labor practice litigation. Accordingly, it concluded that (Pet. App. 33):

> On this record it was proper for the Board to hold All American responsible for remedying violations of the Act committed by its predecessor. * * *[14]

Moreover, the court upheld the Board's finding that Baker would have been offered, and would have accepted, a distributorship in October 1964, and agreed

[13] Baker had been Golden State's top salesman during the 14 months of his employment (A. 102A, 102B). Just prior to his discharge, Schilling told Baker that he was a good employee, doing good work (A. 144). Schilling also told Baker's replacement, Willeford, that Baker had been a good employee and he hoped that Willeford would be able to do as well as Baker (A. 211). Baker testified that he would have accepted an offer to become a distributor (A. 222).

[14] Without deciding whether the Board correctly held Golden State jointly and severally liable for back pay after the sale, the court found that "Golden State concedes it is liable for such wages" by virtue of Golden State's agreeemnt, subsequent to the sale, to indemnify All American for any back pay it owed to Baker (Pet. App. 33–34).

that the Board had properly determined the total amount of net back pay owed Baker (Pet. App. 34-35).

SUMMARY OF ARGUMENT

Our principal contention is that a "successor employer," who takes over its predecessor's business knowing that the predecessor has failed to remedy its unfair labor practice in discharging an employee, may be required to reinstate the employee with back pay. Preliminarily we show that All American is a "successor" for the purposes of the National Labor Relations Act and that it acquired Golden State's bottling business with knowledge of the unfair labor practice proceeding pending against Golden State.

I

A. In *National Labor Relations Board* v. *Burns*, 406 U.S. 272, this Court held that a security service, which took over its predecessor's contract and a number of the predecessor's employees, was a successor employer under Act, inheriting its predecessor's obligation to bargain collectively with the representative of those employees. All American is a successor, not only under the criteria set forth in the opinion of the Court in *Burns*, but also under the more stringent criteria suggested by the dissent in that case. All American acquired the machinery, buildings, accounts receivable, trade name, and real estate of the Golden State bottling business. It retained virtually all of Golden State's employees, including the 12 distributors, and all of Golden State's supervisory and managerial employees, including its general manager,

Schilling. Finally, All American continued to manufacture the same bottled products at the same plant, using the same machinery and equipment, and the products were distributed to the same customers.

B. There is ample evidentiary support for the Board's finding, sustained by the court below, that All American purchased Golden State's bottling business with knowledge that Golden State had discharged an employee, Kenneth Baker, in violation of the Act and had failed to remedy that unfair labor practice. Although Golden State officials Schilling and Crofoot testified that they did not inform All American of Golden State's unremedied obligation to Baker prior to the consummation of the sale on January 31, 1968, the Trial Examiner and the Board were warranted in rejecting these self-serving denials. There is evidence of a concerted effort by Crofoot and Schilling to mislead the Board and the court below by concealing the fact of the sale to All American. Crofoot's responsibilities as President of Golden State, and his actions prior to the the sale relating to this Board proceeding, make incredible his claim that he "hadn't remembered" this proceeding at the time of the sale. Moreover, Schilling, who was responsible for discharging Baker, was not only retained by All American in a managerial position, but he was in contact with All American prior to the completion of the sale. In these circumstances, Schilling's admitted knowledge of the unfair labor practice could properly be imputed to All American not merely after, but prior to, the sale.

II

There are sound bases in both law and policy for the Board's position that a successor employer, like All American, who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the Act and has failed to remedy that unfair labor practice, may be required to reinstate the employee with back pay. *Perma Vinyl Corp.*, 164 NLRB 968, enforced *sub nom. United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544 (C.A. 5).

A. Section 10(c) of the Act, which authorizes the Board to issue remedial orders against "any person named in the complaint," does not limit the Board to issuing orders directed only to the actual perpetrator of an unfair labor practice. The Section must be read in the light of " 'the provisions of the whole law, and * * * its object and policy.' " *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285. It permits the Board to issue orders which are binding upon "successors and assigns." *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9. Section 10(c) may also properly be construed to authorize the Board to issue orders encompassing a *bona fide* purchaser who continues the employing entity which was the locus of the unfair labor practices, where it acquires that entity with knowledge that the predecessor has failed to remedy those unfair labor practices.

Only the successor employer can reinstate to his former position an employee who has been discriminatorily discharged by the old employer. Moreover, since the old employer may be insolvent or his assets may

be difficult to reach, imposing liability for back pay on the successor employer may be the only way of insuring prompt and certain recovery of that sum. Accordingly, unless the successor employer is within the reach of the Board's remedial authority, the basic purpose of the Board's order—*i.e.*, "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal [practices]" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194)—would be defeated.

Requiring a successor employer to remedy its predecessor's unfair labor practice does not impose an undue hardship on it. Since liability is imposed on the successor only when it acquires the business with knowledge of the predecessor's unremedied unfair labor practices, the successor can negotiate an adjustment in the price it pays for the business, or an indemnity clause to cover its potential unfair labor practice liability.

The imposition of remedial responsibility on a successor employer is also in accord with *John Wiley & Sons* v. *Livingston*, 376 U.S. 543. The Court there recognized that "[t]he objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship * * *" (*id.* at 549).

B. Rule 65(d) of the Federal Rules of Civil Procedure is no obstacle to imposing on a successor em-

ployer the duty to remedy its predecessor's unfair labor practices. That Rule permits an injunction to bind persons in "privity," or identified in interest, with "the parties to the action." See *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14–15. Where a *bona fide* purchaser takes over the employing entity which was the locus of the predecessor's unfair labor practices, with knowledge that those unfair labor practices are unremedied, it has stepped into the predecessor's shoes to a sufficient extent to satisfy the requirements of Rule 65(d).

This conclusion does not impair the basic policy of Rule 65(d), to avoid granting "an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law. * * *" *Regal Knitwear, supra*, 324 U.S. at 13. For, the Board makes no adjudication of the new employer's liability without according it a full opportunity at a hearing to present evidence on the questions whether it is in fact a successor and whether it had knowledge of the unremedied unfair labor practices. All American had such opportunity here.

III

The Board properly made Golden State, the predecessor employer, jointly liable with All American for back pay accruing after the sale. First, Golden State had agreed to idemnify All American for such liability. Second, while *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, holds it is not an unfair labor practice for an employer to liquidate its entire

business, even if the liquidation is motivated by vindictiveness toward the union, it does not follow that the employer may thereby relieve itself of all continuing liability for an unfair labor practice committed *prior to* the liquidation. Notwithstanding the sale, Baker continued to be adversely affected by Golden State's unfair labor practice. It is therefore appropriate that Golden State share the responsibility for reimbursing him for the monetary loss which he continues to incur.

IV

It is conceded that, had Golden State not unlawfully terminated Baker, it would have offered him a distributorship and he would have accepted it as of October 1, 1964. Moreover, since All American took over all of Golden State's distributors, he would have continued as a distributor for All American. In these circumstances, the Board did not exceed its remedial authority in requiring that Baker be reimbursed for what he would have earned as a distributor after October 1, 1964, and that he be offered reinstatement as a distributor.

ARGUMENT

The principal question in this case is whether the Board may properly require a *bona fide* successor employer, who acquires its predecessor's business with knowledge that the predecessor has failed to remedy its unfair labor practice in discharging an employee, may be required to reinstate the employee with back pay. Before turning to that question, however, we first show that the Board properly found that All Ameri-

can is a successor employer under the Act, and that it acquired Golden State's business with knowledge of its unremedied unfair labor practice.

I. THE BOARD PROPERLY FOUND THAT ALL AMERICAN WAS A SUCCESSOR EMPLOYER FOR PURPOSES OF THE NATIONAL LABOR RELATIONS ACT AND THAT IT ACQUIRED GOLDEN STATE'S BUSINESS WITH KNOWLEDGE THAT GOLDEN STATE HAD UNLAWFULLY DISCHARGED AN EMPLOYEE AND HAD FAILED TO REMEDY THAT UNFAIR LABOR PRACTICE

A. ALL AMERICAN IS A SUCCESSOR EMPLOYER FOR PURPOSES OF THE NATIONAL LABOR RELATIONS ACT

In *National Labor Relations Board* v. *Burns,* 406 U.S. 272, 279, the Court agreed with the Board that "a mere change of employers or of ownership in the employing industry" does not affect a bargaining obligation imposed by the Act. The Court added that, "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent," a sufficient nexus exists between the old employer and the new one to impose upon the latter the former's obligation to recognize and bargain with the employees' union representative (*id.* at 281). *A fortiori* where, as here, the new employer acquires the physical and intangible assets of his predecessor, as well as his employees, the new employer is a "successor" for the purposes of the Act.

The Justices who dissented from the Court's finding of "successorship" in *Burns* did so because, in their view, the facts showed "a mere naked shifting of a group employees from one employer to another * * *"

(*id.* at 304). However, they acknowledged successorship could properly be found where, in addition to continuity of employees, "there is continuity in the enterprise * * *" (*id.* at 305). Thus, the dissent noted that the Board and courts of appeals have properly found successorship "where the new employer purchases a part or all of the assets of the predecessor employer, *NLRB* v. *Interstate 65 Corporation*, 453 F. 2d 269 (C.A. 6 1971); where the entire business is purchased by the new employer, *NLRB* v. *McFarland*, 306 F. 2d 219 (C.A. 10 1962); and where there is merely a change in the ownership interest in a partnership that operates the employing entity, *NLRB* v. *Colten*, 105 F. 2d 179 (C.A. 6 1939)" (*id.* at 306).

Even under the standard of the dissenters in *Burns*, the Board's finding that All American is a successor employer is valid. All American acquired the machinery, buildings, accounts receivable, trade name, and real estate of the Golden State bottling operation, as well as a covenant that Golden State's principals would not compete with All American. All American retained virtually all of Golden State's employees, including the 12 distributors, and all of Golden State's supervisory and managerial employees, including the general manager, Eugene Schilling. Moreover, All American continued to manufacture the same bottled products at the same plant, using the same machinery and equipment, and to distribute those products to the same customers (*supra*, p. 4).

B. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ALL AMERICAN ACQUIRED GOLDEN STATE'S BUSINESS WITH KNOWLEDGE OF GOLDEN STATE'S UNREMEDIED UNFAIR LABOR PRACTICES

Contrary to petitioners' contention (Br. 42–48), substantial evidence supports the Board's finding, sustained by the court below (Pet. App. 33), that All American purchased Golden State's bottling business with knowledge of the Board's unfair labor practice decision against Golden State. Although Golden State's president, Crofoot, and former general manager, Schilling, testified that they did not inform All American of Golden State's unremedied obligations to Baker prior to the consummation of the sale on January 31, 1968, the Trial Examiner and the Board were warranted in rejecting these self-serving denials, and in finding that these Golden State officials had informed All American.

The Trial Examiner found that both Schilling and Crofoot had misled the Board and the court below in concealing the fact that Golden State had sold its bottling business to All American. Schilling's authority to represent Golden State ended with the sale on January 31, 1968 (A. 196–197). Yet in November 1968, more than 9 months after the sale, Schilling executed a letter and substitution of counsel for Golden State in the court below in his alleged capacity as "General Manager" of "Golden State Bottling Company" (Pet. App. 13–14; A. 82–84). A month later, as "President" of Golden State, he signed a notice to employees required by the Board's order and a certification of posting sent to the Board (Pet. App. 14; A. 92–94). The same day, Schilling offered Baker reinstatement as a driver-

salesman on behalf of Golden State (*supra*, p. 5, n. 8). Likewise, on November 24, 1969, more than 21 months after the sale, Crofoot, as "President of Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento" verified, "under penalty of perjury," the answer to the Board's original back pay specification (see App. B, *infra*, p. 44). That answer made no mention of the sale and alleged, *inter alia*, that Golden State had offered Baker reinstatement on December 11, 1968, more than 10 months after Golden State had gone out of the bottling business (*supra*, p. 5).[15]

Further inconsistencies at the hearing before the Trial Examiner justified the Examiner and the Board in disbelieving the testimony of Crofoot and Schilling that they had not advised All American of the unfair labor practice case prior to the sale. While Crofoot testified that he "hadn't remembered" (A. 129) the case when asked by All American about pending litigation, the Trial Examiner was justified in disbelieving this statement in view of Crofoot's admission that he was responsible for settling all legal matters involving Golden State and had authorized the payment of substantial legal fees in connection with that case (*supra*, p. 7, n. 10). Crofoot's claim that he had forgotten the labor

[15] That some of the documents may have been prepared by Golden State's attorney before he learned of the sale (Pet. Br. 14–15), does not neutralize the fact that Schilling and Crofoot, who did know, nonetheless signed them although they indicated that Golden State was still operating the business. Moreover, Golden State's attorney admittedly learned of the sale in "the Fall of 1969, when he was preparing a response to the original back pay specification" (Br. 14). Yet that response (A. 7–12) does not mention the sale and it was verified by E. J. Crofoot, as President of Golden State (App. B, *infra*, p. 44).

case is further undercut by the contradiction by Willeford, the successor to Baker's route, of Orofoot's claim that he was not present during the 1963 walkout (Compare A. 108 with A. 211).

Moreover, the Trial Examiner found that Schilling, who had fired Baker (*supra*, p. 5 n. 6) and had knowledge of the unfair labor practice proceeding (Br. 45), was in contact with All American *prior* to the consummation of the sale. Schilling participated in at least one of the negotiating sessions, during which he agreed to continue with All American; he met on another occasion with an All American "operations man"; and he executed the contract of sale of the bottling business as Secretary of Golden State (*supra*, p. 7 n. 10). Hence, Schilling's admitted knowledge of the unfair labor practice proceeding could properly be imputed to All American[14] not merely after (see Pet. Br. 45), but prior to, the completion of the sale.

The Board's finding is further supported by the fact that none of the officials of All American appeared as witnesses to deny knowledge of the Board's order against Golden State, nor was their absence explained (*supra*, p. 6). Silence on a factual matter particularly within the knowledge of these witnesses warranted the Board's inference that, if testimony on this issue had been elicited, it would have been un-

[14] See *Thomas Engine Corp.*, 179 NLRB 1039, 1042, affirmed *sub nom. United Automobile Workers v. National Labor Relations Board*, 442 F. 2d 1180 (C.A. 9); *Wirtz v. Ocala Gas Co.*, 336 F. 2d 236, 242 (C.A. 5).

favorable to All American. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226; *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477 482 (C.A. 3); *National Labor Relations Board* v. *Dorn's Transportation Co.*, 405 F. 2d 706, 713 (C.A. 2).

II. A SUCCESSOR EMPLOYER WHO TAKES OVER ITS PREDECESSOR'S BUSINESS WITH KNOWLEDGE THAT THE PREDECESSOR HAS DISCHARGED AN EMPLOYEE IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT AND HAS FAILED TO REMEDY THAT UNFAIR LABOR PRACTICE MAY BE REQUIRED TO REINSTATE THE EMPLOYEE WITH BACK PAY

The Board's position is that a successor employer, like All American, is required to remedy its predecessor's action in discharging an employee in violation of the National Labor Relations Act, when it acquires the business with knowledge that the predecessor has failed to remedy that unfair labor practice. The Board's interpretation of a successor employer's responsibilities has been approved both by the court below and by the Fifth Circuit in *United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544, enforcing *Perma Vinyl, supra*. We show below that the Board's view effectuates the policies of the Act and is consonant with the terms of both Section 10(e) of the Act and Rule 65(d) of the Federal Rules of Civil Procedure.[11]

[11] See Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L. Rev. 735, 813–827 (1969); Comment, *Successor Employer's Obligation to Remedy Unfair Labor Practices*, 68 Colum. L. Rev. 1602 (1968).

A. THE BOARD HAS AUTHORITY UNDER SECTION 10(C) TO ISSUE REMEDIAL ORDERS RUNNING AGAINST A SUCCESSOR EMPLOYER WHO ACQUIRES THE EMPLOYING ENTITY WITH KNOWLEDGE OF THE PREDECESSOR'S UNREMEDIED UNFAIR LABOR PRACTICE

Section 10(c) of the Act states:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

Petitioners contend that the phrase "person named in the complaint" in Section 10(c) limits the Board's remedial powers to the actual perpetrator of an unfair labor practice and prevents the Board from issuing orders binding a successor who did not itself commit the original unlawful act (Br. 33).

Section 10(c) must be read in the light of "'the provisions of the whole law, and * * * its object and policy.'" *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285; accord: *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288. Congress could not "catalogue all the devices and stratagems for circumventing the policies of the Act," nor "define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations"—but instead left the Board with broad discretion to adapt "means to end." *Phelps Dodge Corp.* v.

National Labor Relations Board, 313 U.S. 177, 194. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540. These well-settled principles support the Board's order here.

It is the proper function of a Board remedy to seek "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal [practices]." *Phelps Dodge, supra*, 313 U.S. at 194. The attainment of this objective is impaired where the employing enterprise changes hands subsequent to the commission of unfair labor practices, unless the new employer is subject to the Board's remedial powers. Once the offending employer has relinquished control over the employment relationship, it no longer has power to take most of the steps required to undo the effects of its unfair labor practices.

This Court has recognized that a Board order under Section 10(c), which covered the employer named in the complaint and "its officers, agents, successors, and assigns," could be applied not only to a new employer which is "merely a disguised continuance of the old employer" (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 106), but also, " 'in appropriate circumstances, * * * [to] those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons.*' " *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14 (emphasis added). The

Board's remedial power under Section 10(c) may also properly encompass a *bona fide* purchaser who continues the employing entity which was the locus of the unfair labor practices, where it acquires that entity with knowledge that the predecessor has failed to remedy unfair labor practices."[18]

1. The Board explained the reasons for imposing these obligations upon a successor employer in *Perma Vinyl Corp.*, 164 NLRB 968, 969:

> When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices effectively. * * *

Only the new employer can reinstate to his former position an employee who has been discriminatorily

[18] Although the Court in *Southport*, *supra*, stated that "a *bona fide* discontinuance and a true change of ownership * * * would terminate the duty of reinstatement created by the Board's order" (315 U.S. at 106), the Court had no occasion to focus on the question whether a distinction could properly be drawn between a *bona fide* purchaser who becomes a successor employer for purposes of the Act and one who does not. Moreover, as shown in the text, in *Regal Knitwear*, the Court modified the broad statement in *Southport* by indicating that the Board's order could properly bind those to whom the business has been transferred, not only as a means of evading the judgment, but "for other reasons" (324 U.S. at 14).

discharged by the old employer. Moreover, since the old employer may be insolvent or his assets may be difficulty to reach, imposing liability for back pay on the new employer may be the only way of insuring prompt and certain recovery of that sum."

On the other hand, the successor's refusal to comply with the Board's order is likely to be viewed by the employees—who have remained essentially the same—as a continuation of the predecessor's unlawful labor policies. This would be particularly true here since All American hired, as general manager and president of the bottling operation, the same official, Schilling, who unlawfully discharged Baker. Such an atmosphere would be likely to have a continuing chilling effect upon the employees in the future exercise of their Section 7 rights. See *Darlington Mfg. Co.* v. *National Labor Relations Board*, 397 F. 2d 760, 772–773 (C.A. 4), certiorari denied, 393 U.S. 1023. Accordingly, unless the successor were required to remedy its predecessor's unfair labor practices, it would benefit from

[19] We show, *infra*, pp. 34–38, that the Board may properly make the old employer jointly liable for the back pay.

In *Perma Vinyl* itself, the Board did not impose any back pay liability on the successor because, at the time of the sale, the predecessor had already paid the amount of back pay owing to the discriminatees; the then applicable law had imposed no obligation upon a successor regarding its predecessor's unremedied unfair labor practices (164 NLRB at 970); and the Board wished to give its new ruling "prospective application" (*United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544, 548 (C.A. 5)). None of these circumstances is present here.

that unlawful conduct by acquiring employees who are likely to be inhibited thereby.[20]

2. The imposition of remedial responsibility on a successor employer does not impose an undue hardship on it. Since the successor has elected to continue the same operation with the same work force, it is likely to need the employee who was discriminatorily discharged. *United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544, 548

[20] Petitioners contend (Br. 41) that it is reasonable to impose a bargaining obligation on a successor employer where the unit and the employee complement remain essentially the same (as in *Burns*, *supra*), for "it is the employees' action and theirs alone, which determines the representative with whom the employer must bargain." Petitioners add, however, that the identity of the employing entity has no bearing on the question whether it is appropriate to fasten responsibility on the successor for remedying the predecessor's unfair labor practices, since the "successor employer is surely entitled to a fair chance to establish its own independent image with its new employees, and to articulate and demonstrate its own labor and management policies" (Br. 42). But, as shown in the text above, where the employing entity remains the same, irrespective of the new employer's good intentions, his failure to reinstate, with back pay, an employee who had been unlawfully discharged by the predecessor would be likely to be viewed by the remaining employees as a continuation of the predecessor's anti-union policies, and thereby deter them from exercising their organizational rights in the future. The likelihood of such deterrence is particularly great where, as here, the successor retains the manager who was responsible for the predecessor's unfair labor practice. Moreover, to require the successor to remedy the predecessor's unfair labor practice does not preclude the successor from attempting to persuade the employees that its labor policies were different from those of its predecessor's; indeed, by remedying the predecessor's unfair labor, and thereby wiping the slate clean, that effort could well be facilitated.

(C.A. 5).[21] Should the discriminatee prove to be an unsatisfactory employee, the successor could discharge him for cause. Moreover, since liability is imposed on the successor only where he acquires the business with knowledge of the predecessor's unremedied unfair labor practices, the successor's:

> potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices. [*Perma Vinyl, supra*, 164 NLRB at 969, footnote omitted.]

Indeed, in this case the sales contract contained a representation and warranty by Golden State that there were no actions, suits, or proceedings pending against it. In addition, President Crofoot of Golden State subsequently orally agreed to indemnify All American against any losses arising from the Board's unfair labor practice proceeding (Pet. App. 15; A. 68, 121–124). All American could thus obtain reimbursement from Golden State for any liability it incurred by compliance with the Board's order.

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[21] Contrary to petitioners' contention (Br. 40), the successor would not have to create a job for the discriminatee if his job, in the meantime, had been discontinued for valid economic considerations. See *United States Pipe and Foundry, supra*, 398 F. 2d at 548. In such event, the successor's obligation is no greater than the predecessor's would have been—*i.e.*, to put the discriminatee on a preferential hiring list for future job openings. See *Thomas Engine Corp.*, 179 NLRB 1029, 1030, affirmed *sub nom. United Automobile Workers* v. *National Labor Relations Board*, 442 F. 2d 1180 (C.A. 9).

3. The reasoning of this Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, further supports the Board's conclusion that Section 10(c) of the Act empowers it to require a successor employer, who acquires the business with knowledge of the predecessor's unremedied unfair labor practices, to remedy those unfair labor practices. In *Wiley*, which was a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, the Court held that, where there is a substantial continuity in the business enterprise, a successor employer must arbitrate a union's claim that it is bound by and has violated the collective agreement between the union and the predecessor employer. Among the considerations advanced by the Court in support of its holding was the need to provide "some protection to employees from a sudden change in the employment relationship" (*id.* at 549):

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. * * *

In the absence of a remedy such as the Board has fashioned here, "the employee victims of unfair labor

practices * * * are * * * without meaningful remedy when title to the employing business operation changes hands." *Perma Vinyl, supra,* 164 NLRB at 969. Accordingly, "[t]he objectives of national labor policy * * * require that the rightful prerogative of owners independently to rearrange their businesses * * * [must] be balanced by some protection to the employees * * *." *Wiley, supra,* 376 U.S. at 549. The Board has achieved such a balance by requiring a successor employer, who takes with knowledge, to remedy its predecessor's unfair labor practices.

The importance of *Wiley* to the issues presented here has not been diminished by this Court's recent decision in *National Labor Relations Board* v. *Burns,* 406 U.S. 272. In *Burns,* the successor was merely "doing the same work in the same place with the same employees as his predecessor" (*id.* at 291); it had "purchased nothing from [the predecessor] and become liable for none of its financial obligations" (*id.* at 286). In these circumstances, the Court held that *Wiley* did not override the "freedom of contract" policy reflected in Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), to such an extent as to justify imposing on the successor employer a duty, not only to bargain with the union representing the predecessor's employees, but to honor the predecessor's collective bargaining agreement.[22]

[22] In *Burns,* the Court noted the limitations of its holding stating that, "in a variety of circumstances involving a merger, stock acquisition, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract" (406 U.S. at 291).

In the present case, however, there is no interference with the successor's freedom to bargain collectively, which Section 8(d) protects. Rather the Board is dealing with a successor's conduct in failing to remedy his predecessor's unfair labor practice—which conduct, albeit passive, has perpetuated an interference with the employees' organizational rights under Section 7. Even the dissenters in *Burns,* who were unwilling to find successorship on the facts there presented, specifically acknowledged, referring to the quotation from *Wiley, supra,* p. 28, that "employees are indeed entitled to a measure of protection against change in the employing entity where [as here] the new employer continues to make use of tangible or intangible assets used in carrying on the business of the first employer" (406 U.S. at 302).

B. RULE 65(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT BAR THE BOARD FROM REQUIRING A SUCCESSOR EMPLOYER TO REMEDY ITS PREDECESSOR'S UNFAIR LABOR PRACTICES

Petitioners further contend that Fed.R.Civ.P. 65(d) prohibits the Board from issuing a remedial order binding upon a successor, such as All American. That Rule (App. A, *infra,* p. 43) provides that orders granting injunctions bind only the parties to an action and "persons in active concert or participation with them" who have actual notice of the order.

In *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9, the Court, in affirming the enforcement of a Board order directed to a named employer and its "successors and assigns," stated that the latter phrase could not extend the order beyond the perimeters permitted by Rule 65(d) (*id.* at 14). As noted

previously (*supra*, p. 23), the Court indicated that the Board's order could properly bind those who operate as "'merely a disguised continuance of the old employer,'" and, in appropriate circumstances, "'those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons*'" (*id.* at 14–15, emphasis added). The Court concluded that whether one is covered by the order as a "'successor or assign' depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order" (*id.* at 15).

Under Rule 65(d) an injunction may bind persons identified in interest, or in "privity," with the parties to an action.[22] Thus, those who acquire interests in property which is the subject of litigation are bound by, or entitled to the benefit of, the judgment subsequently entered.[23] In *United Gilpin Corp.* v. *Wilmore*, 100 Colo. 453, 68 P. 2d 34, an injunction which had issued against a mining company and its "successors and assigns," permanently enjoining them from discharging waste products in a stream, was held to bind a subsequent *bona fide* purchaser of the mining company, for the injunctive order was in effect "a restriction or restraint running with future operations of

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[22] Rule 65(d) "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear*, *supra*, 324 U.S. at 14. See also *United States* v. *Dean Mfg. Co.*, 71 F. Supp. 96, 98 (W.D. Mo.).

[23] *Behrens* v. *Skelly*, 173 F. 2d 715, 718 (C.A. 3); ALI, *Restatement of Law—Judgments*, § 89 (1942).

the property involved" (68 P. 2d at 35).[24] Similarly, in *Interstate Commerce Commission* v. *Western N.Y. & P.R. Co.*, 82 Fed. 192 (Cir. Ct., W.D. Pa.), a Commission order prohibiting unjust discrimination which ran against one railroad company was held to bind new companies which, through reorganization, took over the old company:

> Here the new railroad companies have succeeded to the enjoyment of public franchises, and they have voluntarily taken upon themselves the performance of reciprocal public duties. This proceeding is for the enforcement of a public duty which is inseparable from the ownership of the railroad. * * * [82 Fed. at 194.][25]

Similar considerations obtain in "the federal common law of labor relations." As the dissent in *Burns* observed (406 U.S. at 305):

> [T]he doctrine of successorship in the federal common law of labor relations accords to employees the same general protection against

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[24] See also *J.R. Clark Co.* v. *Jones & Laughlin Steel Corp.*, 186 F. Supp. 22, 24 (S.D. Ind.), affirmed, 288 F. 2d 279, 280 (C.A. 7) (purchaser of company with knowledge that it was involved in patent infringement suit bound by the judgment entered in that suit); *Rodman* v. *Rogers*, 109 F. 2d 520, 521 (C.A. 6) (injunction barring an individual from using explosives in the operation of quarry binding on corporation to whom quarry was transferred with knowledge of the injunction); *Rivera* v. *Lawton*, 35 F. 2d 823 (C.A. 1) (purchaser of property with knowledge of injunction restricting house construction bound by that injunction).

[25] A decree may bind a public official who, although not a party to the original suit, succeeds to the powers exercised by the person named in the decree. See *Wright* v. *County School Board*, 309 F. Supp. 671, 677 (E.D. Va.), affirmed, 407 U.S. 451; *Lucy* v. *Adams*, 224 F. Supp. 79 (N.D. Ala.), affirmed *sub nom. McCorvey* v. *Lucy*, 336 F. 2d 892 (C.A. 5).

transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to nonlabor-related claimants against the same entity * * *.

Applying these principles here, and in the interest of fully effectuating the policies of the Act,[11] we submit that a purchaser, who takes over the employing enterprise which was the locus of the predecessor's unfair labor practices, with knowledge that those unfair labor practices are unremedied, has stepped into the predecessor's shoes to a sufficient extent to be deemed identified in interest, or in "privity," with the predecessor for purposes of Rule 65(d).

This conclusion will not subvert the policy, which underlies Rule 65(d), of not having "order[s] or injunction[s] so broad as to make punishment the conduct of persons who act independently and whose rights have not been adjudged according to law * * *" (*Regal Knitwear, supra*, 324 U.S. at 13).

In *Perma Vinyl, supra*, 164 NLRB at 969, the Board ruled that:

> no * * * adjudication of [the successor's] liability can be made without affording the bona fide purchaser a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices. The successor would also be entitled, of course, to be heard against the enforcement of any order issued against it. * * *

[11] The foregoing principles "may be applied in fuller measure in furtherance of the public interest * * * than if only private interests were involved." *Walling* v. *Reuter*, 321 U.S. 671, 674–675.

The procedure followed by the Board here insured that All American's rights were adjudged "according to law." Thus, All American was joined with Golden State as a party to the supplemental back pay proceeding. The Board served All American with the Notice of Hearing, along with the back pay specification asserting its joint and several liability for its predecessor's unremedied unfair labor practice. All American appeared at the hearing, represented by counsel. During the hearing, All American had a full opportunity, which it took, to introduce evidence on whether it was a successor employer and whether it had knowledge of the unfair labor practice. All American's counsel filed with the Board exceptions to the Trial Examiner's decision and supporting and supplemental briefs. All American also obtained review of the Board's decision in the court below. In these circumstances, there was full compliance with Rule 65(d).[25]

III. THE BOARD PROPERLY MADE GOLDEN STATE JOINTLY LIABLE WITH ALL AMERICAN FOR BACK PAY ACCRUING AFTER THE SALE

Petitioners contend (Br. 27–31) that the Board lacked authority to make Golden State jointly liable with All American for back pay accruing to Baker

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[25] *National Labor Relations Board* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (C.A. 10), relied on by petitioners (Br. 34–35), is distinguishable in this respect. There, the successor employer was "adjudged of wrongdoing on its part without complaint, notice, full opportunity to present its defense and the other essential requirements of due process" (*id.* at 237).

after the date of the sale." However, as the court below noted (Pet. App. 33–34):

> Golden State agreed to indemnify All American for any liability imposed upon All American for back pay, and we have upheld the Board's imposition of such liability upon All American for the post-acquisition period. Accordingly, Golden State concedes that it is liable for such wages by virtue of its agreement, whether or not it would also be liable absent that agreement.

The agreement to indemnify All American was unequivocal. Not only did Golden State warrant against any pending litigation, but its president, Crofoot, testified (A. 123):

> I discussed [indemnification of All American against losses in this proceeding] * * * with Mr. Schilling and told him that I thought the contract covered our liability for any loss that might be sustained, but that if it didn't I would be happy to so guarantee.

The dispute over the Board's power to require Golden State to give Baker back pay accruing after the sale is thus academic, and the court below properly concluded that it did not need to resolve it.

In any event, we submit that the liability of a predecessor, like Golden State, for back pay does not end with the transfer of its business to a successor. The imposition of this obligation upon a predecessor is con-

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" Contrary to petitioners' suggestion (Br. 22, 28, 31), the Board's order imposes a reinstatement obligation only on All American (Pet. App. 16–17, 20). The back pay liability of both Golden State and All American will terminate upon a valid offer of reinstatement by All American.

sistent with the Board's authority to fashion remedies which will effectuate the policies of the Act (*Phelps Dodge Corp.* v. *National Labor Relations Board*, *supra*, 313 U.S. at 194–195), and is not barred by *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263.

In *Darlington*, the Court held that it is not an unfair labor practice for an employer to liquidate its entire business, even if the liquidation is motivated by vindictiveness toward the union. It does not follow, however, that the employer may thereby relieve itself of all continuing liability for an unfair labor practice—such as a wrongful discharge—committed *prior to* the liquidation [30] and wholly unrelated to it. Thus, where the employer previously has unlawfully discharged an employee, it has created a situation unrelated to the liquidation, which continues after the liquidation—*i.e.*, the employee remains unemployed as a result of the employer's unlawful action.[31] While the liquidation may preclude the employer from reinstating the employee, it does not prevent it from compensating the employee for the monetary loss which

[30] The Court noted that (380 U.S. at 272, n. 14): "The Darlington property and equipment could not be sold as a unit, and were eventually auctioned off piecemeal. We therefore are not confronted with a sale of a going concern, which might present different considerations under § 8(a)(3) and (5). Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543; *Labor Board* v. *Deena Artware, Inc.*, 361 U.S. 398."

[31] Here, but for Golden State's unfair labor practice, Baker would have become a distributor on October 1, 1964, and, as such, there is every likelihood that he would have been taken over by All American, since it took over the other Golden State distributors (*supra*, pp. 4, 8–9).

he continues to incur as a result of the employer's earlier misconduct.

Accordingly, and in view of the nature of a back pay order,[32] the Board may properly subject an employer who liquidates or sells its business to liability for back pay accruing subsequent to such liquidation or sale. See *Darlington Mfg. Co.* v. *National Labor Relations Board*, 397 F. 2d 760, 773 (C.A. 4), certiorari denied, 393 U.S. 1023; cf. *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261, 264–265 (C.A. 8). This is particularly justified where, as here, the employer, prior to the liquidation or sale, failed to make a reasonable or good faith effort to undo the effects of its unlawful conduct.[33]

Nor is a different conclusion required because of the

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[32] "A backpay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27.

[33] The court below enforced the Board's order with respect to Baker on December 2, 1965. From that date until the sale on January 31, 1968, Golden State made no attempt to terminate its back pay liability by offering Baker reinstatement. Nor did Golden State attempt to place Baker in its other enterprises or with any other employer. Golden State did not even inform Baker of the sale of the bottling company, thereby impeding him in applying for a position with All American. Golden State's first offer of reinstatement did not occur until December 11, 1968, and it was invalid (see *supra*, p. 5, n. 8). Moreover, contrary to petitioners' suggestion (Br. 8–9), the belatedness of the offer was not excused by the fact that the court below did not dispose of the Board's petition for rehearing until November 27, 1968. The Board's petition for rehearing involved a lockout issue which was wholly unrelated to the unfair labor practice involving Baker (*supra*, p. 3, n. 3).

Board's view, expressed above, that, where the successor has knowledge of the predecessor's unfair labor practices, the selling price may reflect the potential liability which such practices may cause. The Board believes that the public policy reflected in the Act that employees should be made whole for injuries they suffer as a result of unfair labor practices justifies requiring the predecessor, as well as the successor, to reimburse the employee for earnings lost as a consequence of the predecessor's violations. Cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 54–55.

IV. THE BOARD PROPERLY DETERMINED THE AMOUNT OF BACK PAY DUE THE UNLAWFULLY DISCHARGED EMPLOYEE AND ORDERED THAT HE BE REINSTATED AS A DISTRIBUTOR

Petitioners concede (Br. 11, 51) that there is substantial evidence to support the Board's finding that, had Golden State not unlawfully terminated Baker, it would have offered him an independent distributorship and he would have accepted it and become a distributor as of October 1, 1964. Petitioners contend, however, that the Board exceeded its authority by failing to terminate back pay liability as of that date, and instead adding an amount to reflect Baker's earnings as a distributor after October 1, 1964, and requiring that he be offered reinstatement to that position.

Contrary to petitioners' assertion (Br. 51–52), even if Baker's becoming a distributor would have changed his status from "employee" to "independent contrac-

tor,"[34] this would not have terminated his right to receive back pay. As a distributor, Baker would not have wilfully lost earnings that could have mitigated back pay liability, nor would he have removed himself from the labor market.[35] Instead, he would still have been working for Golden State, and its successor, All American, under an arrangement which they sanctioned. He would have performed a function closely connected with, and necessary to the continued operation of, the bottling business—distributing the same products to the same customers whom he serviced as a driver-salesman.

Petitioners also contend (Br. 52–56) that the Board had no authority to require that Baker be offered reinstatement as a distributor. As shown (*supra*, p. 23), the Board, in issuing a remedial order under Section 10(c) of the Act, has power to place the parties, so far as

[34] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes an independent contractor from the definition of "employee." The Board found it unnecessary to resolve the question whether the distributors were employees or independent contractors (Pet. App. 20–22).

[35] In *Mastro Plastics Corp.*, 136 NLRB 1342, 1350, the Board stated that a claim for back pay should be disallowed for any period in which the employee quit an interim job with another employer, "if the evidence supports a finding that the claimant would have left Respondent's plant for the same reason that he left the interim job * * *." The Board added (*ibid.*):

"A claimant who goes into business on his own is treated similarly to one who obtains interim employment; in his case his net profits are treated as interim earnings. * * *"

"Self-employment does not in and of itself indicate withdrawal from the labor market. *Brown and Root, Inc., et al.*, 132 NLRB 486. See also *McCann Steel Co.*, 203 NLRB No. 115, 83 LRRM 1175, 1177, May 18, 1973.

possible, where they would have been if the unfair labor practice had not occurred. Since Baker, if he had not been unlawfully discharged, would have become a distributor for Golden State and would have continued as a distributor for All American, the Board's remedial power is broad enough to permit it to require that Baker be reinstated as a distributor. Only then could the *status quo ante* be restored."[36]

Finally, petitioners contend that the Board, in requiring that Baker be reimbursed for what he would have earned as a distributor, exceeded its authority by awarding "consequential damages, based upon anticipated, and wholly speculative profits which might have been earned in a hypothetical business" (Br. 56). It is settled that the Board, in computing gross back pay, need only reasonably approximate the back pay which an employee would have earned had he not been un-

[36] See *National Labor Relations Board* v. *Bell Aircraft Corp.*, 206 F. 2d 235, 236–237 (C.A. 2), where the court upheld a Board order requiring the employer, who had unlawfully denied an employee promotion to a supervisory job, to promote the employee to supervisor and pay him the wages he lost. Supervisors, like independent contractors, are excluded from the definition of "employee" (Section 2(3) of the Act, 29 U.S.C. 152(3)).

Nor may this case be distinguished on the ground (Pet. Br. 54) that there "the Respondent, as the employer, continued to administer employment policy and pay wages, on the one hand, and the discriminatee continued on, without further interruption, as an employee, albeit in an improved situation." As shown (pp. 4, 17), the distributorships here were an integral part of the bottling operation, and the individual distributors continued, under essentially similar conditions, to perform for that operation the same functions which they had performed as driver-salesmen. Indeed, two of the driver-salesmen who became distributors eventually returned to their former status of driver-salesmen (Pet. Br. 59).

lawfully denied employment by his employer." The Board concluded that Baker's gross back pay from October 1, 1964, when he would have become a distributor for Golden State, should be computed on the basis of the net profits of Thorne, petitioners' most successful distributor and the employee whose earnings as a driver-salesman were most comparable to Baker's during Baker's 14 months of employment with Golden State (*supra*, pp. 3–4). Since the earnings of the distributors varied depending on their ability and initiative (see A. 239–240), the use of the earnings of a comparable distributor, Thorne, as a basis for computing Baker's gross back pay was fair and reasonable.[37]

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[37] *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8); *National Labor Relations Board* v. *Charley Toppino and Sons*, 358 F. 2d 94, 97 (C.A. 5); *National Labor Relations Board* v. *Rice Lake Creamery Co.*, 365 F. 2d 888, 891 (C.A. D.C.).

[38] See *National Labor Relations Board* v. *East Texas Steel Castings Co.*, 281 F. 2d 686, 687 (C.A. 5); *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 375 F. 2d 402, 403 (C.A. 5), certiorari denied, 389 U.S. 859.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1973.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> Sec. 10 * * *
>
> * * * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: * * *

The relevant provisions of the Federal Rules of Civil Procedure, 28 U.S.C., are as follows:

> Rule 65(d):
>
> Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

APPENDIX B

The verification attached to the answer to the first back pay specification (A. 7-12) is as follows:

(Verification—446, 2015.5 C. C. P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I am the President of Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento, Respondent in the above certified action; I have read the foregoing Answer of Respondent to Backpay Specification and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November , 1969 at Sacramento, California.

E. J. CROFOOT.

STATE OF CALIFORNIA,
County of Sacramento, ss:

On this 24th day of November in the year one thousand nine hundred and 69 before me, Raymon D. Cross, a Notary Public, State of California, duly commissioned and sworn, personally appeared E. J. Crofoot known to me to be the person whose name subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the_____County of Sacramento the day and year in this certificate first above written.

RAYMON D. CROSS,
Notary Public, State of California.

My Commission Expires June 21, 1972.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF.

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SUBJECT INDEX

Page

I.

Golden State's Liability for Reinstatement and Further Back Pay Accruals Could Not Be Continued Beyond the Sale of Its Soft Drink Business on 31 January, 1968 2

II.

The Board's Attempt to Impose Vicarious Liability Upon an Innocent Successor/Purchaser Employer for Unfair Labor Practices It Did Not Commit Is Without Statutory Authority and Repugnant to Principles of Due Process 7

III.

All American Cannot Be Held Liable in Any Event Due to the Failure of the Board to Prove It Had Pre-Sale Knowledge of the Unfair Labor Practices of Its Predecessor 16

IV.

The Board's Brief Fails to Set Forth Any Authority to Support the Remedial Aspects of Its Order 23

A. All Liability Ceased to Accrue as of October 1, 1964 23

B. The Board Was Without Authority to Order the Character of Remedial Action Purportedly Enjoined by It Upon Petitioners 24

Conclusion 25

TABLE OF AUTHORITIES CITED

Cases	Page
Alemite Mfg. Corp. v. Staff, 42 F. 2d 832 (2nd Cir. 1930)	13
Chase National Bank v. Norwalk, 291 U.S. 431 (1933)	12, 13
Darlington Mfg. Co. v. NLRB, 397 F. 2d 760 (4th Cir. 1968)	4, 5
Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1938)	21
Liberty Electronics Corp., 143 NLRB 605, 53 LRRM 1370 (1963)	7
Mastro Plastics Corp., 136 NLRB No. 119, 50 LRRM 1006 (1963)	23, 24
NLRB v. Dorn's Transportation Co., 405 F. 2d 706 (2nd Cir. 1969)	21
NLRB v. Golden State Bottling Company, Inc., 353 F. 2d 667 (9th Cir. 1965)	3
NLRB v. Great Dane Trailers, 388 U.S. 26 (1967)	21
NLRB v. Missouri Transit Co., 250 F. 2d 261 (8th Cir. 1957)	5
NLRB v. Wallick, 198 F. 2d 477 (3rd Cir. 1952)	22
New Madrid Mfg. Co., 215 F. 2d 908 (8th Cir. 1954)	4, 5
Perma Vinyl Corp., 164 NLRB No. 119, 165 LRRM 1168 (1967)	7, 10, 16, 20
Regal Knitwear v. NLRB, 324 U.S. 9, 89 L. Ed. 661, 65 S. Ct. 478 (1945)	8, 9, 12
Symms Grocer, 109 NLRB No. 58, 34 LRRM 1326 (1954)	2, 7, 8, 9

Page

Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 13 L. Ed. 2d 827, 85 S. Ct. 994 (1965) 3

United States v. Dean Mfg. Co., 71 F. Supp. 96 (W.D. Mo. 1946) 11, 12

United Gilpin Corp. v. Wilmore, 100 Colo. 453, 68 P. 2d 34 (1937) 11, 12

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 22

Rules

Federal Rules of Civil Procedure, Rule 65(d) 8

Statutes

National Labor Relations Act, Sec. 7 15

National Labor Relations Act, Sec. 10(c) 7

Textbook

78 Harvard Law Review, "Developments in the Law of Injunctions" (1965), pp. 994, 1029 13

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October Term, 1973
No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF.

The Board's Brief[1], for the most part, deals with the impressive authority opposed to its position by expediently avoiding mention of it. To the extent that it is acknowledged at all, it is quoted out of context and its pertinence to the case at bar otherwise misread. Conspicuously absent from the Board's discussion of the

[1]In this Reply Brief, Petitioners will continue to use the terminology adopted and employed in their Opening Brief.

predecessor/successorship issues involved herein, is any discussion of its own earlier decision in *Symms Grocer*, 109 NLRB #58; 34 LRRM 1326 (1954).

In sum, the Board has failed to meet and deal squarely with these opposing authorities and the principles expounded by them. Such circuitous argument does not persuade; it only exposes the weakness of the Board's present view while, at the same time, confirming the soundness of its earlier position.

In the following pages, we will attempt, within the organizational framework of Petitioners' Opening Brief, to clarify those matters embraced within the Board's discussion which have not previously been covered in our presentation.

I.

Golden State's Liability for Reinstatement and Further Back Pay Accruals Could Not Be Continued Beyond the Sale of Its Soft Drink Business on 31 January, 1968.

For the first time in this prolonged litigation, the Board asserts that its Order does not impose any liability for reinstatement upon the predecessor employer, Golden State (Bd. Br. 35, fn. 29).[2] While the change of attitude thus manifested is perhaps a reassuring omen, it is no more, since the Board's statement is belied by the actual language of its own orders.

By the Board's original Order herein, Golden State was ordered to "offer Baker immediate and full reinstatement to his former or substantially equivalent position, and make him whole for any loss of earnings occasioned by such discrimination . . ." (App. Cert. 1-2). This

[2]Hereinafter, the Board's Brief shall be designated "Bd. Br."

aspect of the Order was enforced, without modification, by the Court of Appeals in its original decision herein.[3] By its supplemental decision, the Board reaffirmed its earlier determination as against Golden State and imposed co-equal liability upon All American. In its opinion below, the Court of Appeals enforced this Order, without modification. Neither order or court decision has since been withdrawn or modified in any respect whatever.

Even though it now concedes that the sale should have served to terminate this aspect of Golden State's remedial liability, it insists, however, upon a selective termination only, still holding the predecessor to an open-ended, continuing accrual of back pay liability past the time of sale despite its inability to perform any act which would terminate this accrual. This result is justified, says the Board, by virtue of the fact that Golden State failed, while it was still able, *but before it was finally adjudged liable to do so*, to take any steps to mitigate the effects of its wrongful conduct! (Bd. Br. 37).

This unjust reasoning flies in the face of the philosophy and the rule enunciated by this Court in *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263; 13 L. Ed. 2d 827; 85 S. Ct. 994 (1965), (hereinafter referred to as "Darlington"), in which it was held that an employer was perfectly entitled to go out of business, without liability under the Act, even though the decision to do so be motivated by anti-union animus, *i.e.*, technically an unfair labor practice. In somewhat backhanded deference to the force of this authority, the Board has attempted to distinguish the case at bar

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[3] *NLRB v. Golden State Bottling Company, Inc.*, 353 F. 2d 667 (9th Cir. 1965).

by suggesting that the rule of *Darlington* applies only to unfair practices committed *in the process of liquidation*, but not to those committed earlier (Bd. Br. 37). This distinction is wholly artificial. Nothing uttered in *Darlington* offers any support for it. On the contrary, the cases quoted by the Court with approval positively rule out such a possibility. See *New Madrid Mfg. Co.*, 215 F. 2d 908 (8th Cir., 1954), quoted in 380 U.S., at page 271.

Even so, the Board's distinction is beside the point. Petitioners do not contend that the sale of the business erases all liability for past wrongdoing. It simply terminates further accruals of continuing liability for back pay.

The Board cites *Darlington Mfg. Co. v. NLRB*, 397 F. 2d 760 (4th Cir. 1968), hereinafter referred to as "Second Darlington", which was the sequel to this Court's earlier decision discussed above. Upon remand, the Board found that the plant closing in question was motivated by a desire to discourage union activity in other plants owned by the same employer and therefore fell within the exception earlier spelled out by this Court. That is to say, the plant closure in that instance *did* constitute an unfair labor practice. To remedy this, the employer was ordered to make the employees whole for loss of back pay until such time as they were either given substantially equivalent employment in other plants of the employer, or placed on preferential hiring lists therein. This Order was enforced by a sharply divided Court of Appeals.

The case is clearly distinguishable from the case at bar and, in effect, supports the main thrust of Petitioners' contention. First, the case trips up the Board

on the very distinction it tries to draw above, since the unfair practice there was committed in the process of the plant closing which, the Board concedes, is not the situation in this case. As Petitioners have argued, however, this is a distinction without a difference.

The pertinent distinction is that in *Second Darlington,* the employer did not go completely out of the textile business, and was thus still able to offer substantially equivalent employment to the discriminatees in its other plants. In other words, it *was* able to take some act to terminate the on-going accrual of liability.

In the instant case, there has never been any suggestion of any kind that Golden State's sale of the business was in any way unlawful, irregular or motivated by anti-union animus; secondly, the sale terminated all interest and activity on its part in the soft drink business and lastly, it was thereafter wholly incapable of furnishing substantially equivalent employment to its former employees.

Similarly, in *NLRB v. Missouri Transit Co.,* 250 F. 2d 261 (8th Cir. 1957), also cited by the Board, the order compelling reinstatement of employees wrongfully discharged prior to the partial liquidation of the business, was enforced in view of the fact that the employer had liquidated *only a portion* of his business. The Court, acknowledging this, cited and quoted the identical language from *New Madrid Mfg. Co.* which was approved by this Court in *Darlington,* and then went on to add (215 F. 2d at p. 264), the following:

> "Had the Board in the instant case ordered the respondents to reinstate the shuttle-busline drivers in the interstate operation *which had been sold and over which respondents no longer had*

any control, we would consider our decision in the New Madrid case controlling." (emphasis added).

Perhaps in tacit recognition of the frailty of its position, the Board seeks to shore up its imposition of potentially infinite liability on Golden State by arguing that its agreement to indemnify All American constituted a "concession" of its liability in the premises. There are several things wrong with this.

First, and perhaps most obvious, is the fact that Golden State's very role in this lengthy litigation demonstrates that it concedes no such thing, since it has vigorously and, at considerable cost to itself, consistently disputed any such contention. Secondly, it is quite clear from the record—even those portions quoted by the Board itself (Bd. Br. 35)—that the so-called "agreement" to indemnify was nothing more than a confirmation, by Crofoot, of the warranty against pending litigation contained within the sale agreement, and an acknowledgement by him that he would honor any obligation to which a breach of that warranty might give rise.

The inference to be drawn from the circumstance is certainly not a concession of liability. If anything, Crofoot's ready disposition to stand by his contractual obligation bespeaks the depth of his conviction that *no* remedial liability in respect of Baker could be imposed against All American and that, consequently, Golden State would not be required to indemnify it for anything! Given the contentions so tenaciously and consistently asserted by these Petitioners throughout in these proceedings, this is the *only* inference which can reasonably be drawn from this circumstance.

Lastly, however, the Board continues to overlook the difference between primary and secondary liability. Even assuming that Golden State were to become liable to indemnify All American by virtue of a contractual undertaking, neither the Board nor Baker can be considered a third party beneficiary of that contract. All American's right of indemnification is not a right which can be enforced by either Baker or the Board, nor can it be made the basis for an order whose breach would result not in a civil judgment for damages, but in the sanction of contempt. Nor can such an agreement be equated with a contractual assumption of liability by the *buyer*, as was the case in *Liberty Electronics Corp.*, 143 NLRB 605; 53 LRRM 1370 (1963), cited in *Perma Vinyl*.

II.

The Board's Attempt to Impose Vicarious Liability Upon an Innocent Successor/Purchaser Employer for Unfair Labor Practices It Did Not Commit Is Without Statutory Authority and Repugnant to Principles of Due Process.

The Board attempts to brush aside the notion that §10(c) of the Act[4] represents any limitation upon the power it seeks to exercise herein. The best answer to its rather threadbare argument in this connection, is the language of the Board itself, addressed to the same problem in the identical context in *Symms Grocer* (34

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[4]"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in a complaint has engaged or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . ."

LRRM at p. 1327), which was quoted in Petitioners' Opening Brief (at pp. 33-34). Conspicuously missing from the Board's discussion is any recollection of this language or any attempt to reconcile it with the present effort to sweep aside the clear limitation imposed by that Section.

Instead, the Board avoids coming to grips with the very portions it earlier emphasized. The Board cites the words "person named in the complaint", but skirts around the heart of the Section which makes it clear that the Board's authority is limited to proceedings against persons who *have actually engaged in unfair labor practices* and that it is not empowered to impose vicarious liability, whether remedial or not, upon persons who have not engaged in or committed such acts.

The same disposition to sidestep, blur and obfuscate rather fundamental limitations which, at one time, it was most scrupulous to observe, is evidenced in the Board's present approach to the requirements imposed by Rule 65(d) of the Federal Rules of Civil Procedure,* which received such exhaustive and penetrating analysis by this Court in *Regal Knitwear v. NLRB*, 324 U.S. 9; 89 L. Ed. 661; 65 S. Ct. 478 (1945).

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*Federal Rules of Civil Procedure 65(d): *The Form and Scope of Injunction of Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

In *Symms Grocer*, the Board acknowledged the applicability of both the rule and the case to the instant situation, in the following language:

> "The Supreme Court in the Regal Knitwear case indicated that the Board's power to issue orders binding on the successors and assigns of respondents before the Board was limited by Rule 65 of the Federal Rules of Civil Procedure. In defining the classes of persons bound by orders of federal courts against parties to litigation therein, that rule does not, in our opinion, reach persons who purchase the business of a party litigant under the conditions governing Idaho's purchase of Symms' business in the instant case. We conclude, therefore, that there is no statutory warrant for that portion of the Decision and Order herein which found Idaho responsible for remedying, and directed it to remedy, the unfair labor practices of Symms."

Regal Knitwear emphasized that an order could impose liability only as against the actual parties to the proceeding or as to whom there existed an independent basis for liability whether by virtue of active concert or participation or collusion, or otherwise. Given this context, the Board has now seized on the "or otherwise" aspect of the Court's language in this respect to append an "open sesame" interpretation to the rule of *Regal Knitwear*, which would sweep any and all persons within the ambit of an Order regardless of complicity in the act originally charged, thus setting at naught the very principle which *Regal Knitwear* was at such pains to expound.

The incongruity of this assertion is, in fact, really not lost on the Board. In deference to the concept of due process including the demand that a party be afforded a hearing on the merits, the Board suggests, in all seriousness, that All American was afforded just that in the case at bar, since it was a party to the supplemental proceedings which resulted in the imposition of vicarious liability against it as a successor. This procedure is a little bit like convicting a person of crime *in absentia*, without permitting him to appear and defend on the merits, but allowing him, by way of mitigation, to participate in the penalty phase of the proceeding and argue concerning the severity of the sentence to be imposed.

To any fair-minded person, this is mockery.

Equally shocking is the fact that there is nothing in the Board's Order, or in the *Perma-Vinyl* doctrine contended for, to limit this deprivation of rights to the first successor, All American. According to this rationale, the aggrieved employee would have full recourse against yet another employer every time the business changed hands, regardless of the fact that each new successor was equally guiltless of any unfair labor practice and equally powerless to command a hearing or present evidence which might establish that fact.

Such a possibility cannot be dismissed as far fetched speculation, for in the case at bar, the business in question has once again changed hands: as of 30 March, 1973, All American was acquired by General Cinema Corporation. Presumably, the Board will shortly seek to add yet a third string to its bow.

Nowhere in this litigation is it contended that All American is or was either a party to the original

proceedings, a person in active concert or participation with Golden State in the commission of its original unfair labor practices, or a participant in any collusive scheme or plan to evade the effect of the Board's Order. It was, in fact, specifically found otherwise. Neither has it ever been suggested that the sale was anything other than a *bona fide* transaction entered into at arm's length which resulted in a genuine and total transfer of interest. Again, the genuineness and *bona fides* were specifically confirmed by the Board. In these circumstances, no order issued in the original proceedings could bind or run against All American. The Court stated in the case of *United States v. Dean Mfg. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946), inexplicably cited in the Board's brief herein, as follows (71 F. Supp. at p. 97):

> "Under said Rule [Rule 65(d)] mere knowledge, in and of itself, of the issuance of an injunction would not make a person, not a party to an injunction suit, liable to contempt proceedings for committing an independent act not done in 'active concert or participation with' a party bound by the injunction."

Injunction cases cited by the Board in support of its position do little to resolve its unhappy dilemma. These cases, with the exception of *United Gilpin Corp. v. Wilmore*, 100 Colo. 453, 68 P. 2d 34 (1937), (herein referred to as *United Gilpin*) hold simply that a court may impose *in rem* restrictions against properties (as distinct from persons) passing from a seller to a purchaser, and thereby preclude the *continuing* misuse of the property in a certain manner. In fact, one of the cases cited by the Board, *United States v.*

Dean, supra, quoted above, makes it absolutely clear that such holdings would not apply to the facts in the instant case.

The Board, perhaps in recognition of the foregoing, merely footnoted these cases, reserving its emphasis for *United Gilpin*. Even so, it is interesting to note that the Board did not quote the actual language of that case (Bd. Br. 35-36), for to have done so would simply highlight its incompatibility with the consistent holdings of this Court. See, for example, the following (69 P. 2d at p. 35):

> "All members of the public are bound to observe the restrictions of an injunctive order known to be in existence, and issued by a court within its jurisdiction. Any person, though a stranger to the proceedings, who with knowledge of the existence of an injunctive writ and its terms, violates the order or assists others in so doing is by such inference defying the administration of justice and is subject to the resulting perils and penalties."

Regal Knitwear was only one of many cases diametrically opposing any such notion as that expressed by the Colorado Court. See, for example, *Chase National Bank v. Norwalk*, 291 U.S. 431, at 436-437 (1933), which states as follows:

> "It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which a law already implies . . . But, by extend-

ing the injunction to 'all persons to whom notice of the injunction should come', the district court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law."

An equally eloquent statement to the same effect, by Judge Learned Hand, may be found in *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (2nd Cir. 1930); also see "*Developments in the Law of Injunctions*", 78 Har. L. R. 994, 1029 (1965).

Almost as if recognizing that it may have gone a bit far, the Board, for the first time in this proceeding, and in a footnote at that (Bd. Br. 27, fn. 21), suggests that the duty of reinstatement is, in any event, only conditional. All American (or Golden State, for that matter) has no obligation to "make a position" for Baker; its obligation is fulfilled merely by placing him on a preferential hiring list, if no job is presently available. This assertion is, to say the least, inconsistent with the uncompromising language of its two Orders or the decisions enforcing them without modification.

Equally unmeritorious are the policy considerations set forth in the Board's brief. At the forefront of these is the Board's assertion that only the new employer can "reinstate" the former employee to his original position, and that the imposition of a duty to do so is mitigated by the fact that the successor is likely to "need" this employee and, if he proves to be unsatisfactory, may discharge him for cause.

On the other hand, the Board does not dispute that, other things being equal, the successor is under no

obligation to hire *any* of the employees of his predecessor and that, as a consequence, no employee of the predecessor would otherwise have any right to demand employment by the successor. No reason is presented by the Board why a discriminatee should have a greater right than his fellow employees in this respect. Nor is any reason suggested why the discriminatee should not have a duty of reapplying for employment if, indeed, he does wish to be rehired.

Examination of the matter from this aspect exposes a factor which has been quite overlooked by the Board, and that is the question of whether or not the employee/discriminatee really desires reemployment. In the instant case, that is a highly debatable question. Baker, following his discharge, promptly found other employment which ultimately proved to be better paying than his former job with Golden State. At the time of the hearing, he was still permanently so employed. In December, 1968, within a matter of days following the final entry of the Court's original decision of enforcement, Baker was given an unequivocal offer of reinstatement to his old job which he promptly rejected. The Board's dogmatic assertions to the contrary notwithstanding, the real reason Baker turned this offer down was that he was not about to leave a permanent good-paying job to take the less remunerative one.*

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*The Board's assertion that Baker refused the offer of reinstatement because he realized that Schilling was purporting to represent Golden State when he no longer had any authority to act on its behalf is palpably absurd, since the letter offer was, as earlier pointed out, completely unequivocal and unambiguous and, on its face, made no reference to Golden State or All American as such but unequivocally offered reinstatement with Pepsi-Cola Bottling Company of Sacramento. Further, any claim that Baker rejected it on the ground that he was entitled to be offered a distributorship is equally unrealistic, since the Board itself did not so conclude—and so advise Baker—until several months after the offer had expired.

This fact is in no way inconsistent with Baker's position of several months later, taken at the Board's suggestion, that he was entitled to remuneration on the basis of a distributor's earnings, rather than a driver-salesman's wages.

In other words, in the case at bar, what Baker really (and quite understandably) desires is not re-employment, but the considerable windfall which the Board's unorthodox computations would insure to him.

If, indeed, an employee does wish reemployment, there is nothing to prevent his re-applying to the successor and every reason for requiring him to take at least that initiative. If the successor should refuse him because of prior union affiliation (thus attempting to perpetuate the theoretical "benefit" allegedly inuring to it by virtue of its predecessor's wrong) then it is guilty of a violation in its own right which the prescribed procedure of charge, hearing, and conviction can surely remedy in due course. If, on the other hand, the employer has no need for him, then it does indeed impose a hardship to insist that it make a place. To modify this to the extent of requiring it only to place the employee on a preferential hiring list does not answer to the employee's presumed needs and only underscores the fundamental incongruity of applying a remedy in a wholly different context from that in which the wrong arose against a party in no way culpable.

In similar fashion, the Board's assertion that the successor's refusal to comply with a Board Order is likely to have a "chilling effect" upon the employees in the future exercise of their Section 7 rights, is unrealistic. In the instant case we are dealing with an event occurring some ten years ago, and it is patent nonsense to

presume that it has any current or continuing effect whatever on a unit which has enjoyed uninterruptedly harmonious relations with its employer ever since. Since the Board, in any event, has no authority under the Act to require such compliance from an innocent successor, there should be no Order in the first instance. Without an Order, there can be no refusal to comply and, as a consequence, no chilling effect.

We suggest, as urged in our Opening Brief, that the only rule in the premises, is to require of a successor that he deal with the discriminatees of his predecessor, if any, on a basis no different from that which is required of him in dealing with any of his predecessor's other employees or other applicants for employment, for that matter.

III.

All American Cannot Be Held Liable in Any Event Due to the Failure of the Board to Prove It Had Pre-Sale Knowledge of the Unfair Labor Practices of Its Predecessor.

A prerequisite to the application of *Perma Vinyl Corp.*, 164 NLRB No. 119, 165 LRRM 1168 (1967), upon which the Board relies to impose joint liability upon Golden State and All American, is proof that All American possessed pre-sale knowledge of its predecessor's unfair labor practices. Nowhere in its Brief does the Board dispute that the burden of this proof rests solely upon its General Counsel. However, the only evidence on the issue showed that such knowledge did not exist. This evidence is as follows:

1. The testimony of Crofoot, President and owner of Golden State, and Schilling, its Secretary and General Manager of its Pepsi-Cola operation, that because

the action had been pending in the Ninth Circuit for such a long time and because, in their view, it did not present a large liability (Baker had promptly obtained equivalent employment), the matter had been simply overlooked (App. 119, 121, 127-130, 170-172);

2. The purchase agreement executed by All American contained an unequivocal warranty against any pending litigation (App. 80), which warranty, arguably, would be waived by All American had it executed the agreement with knowledge this litigation actually pended;

3. Golden State's labor attorney, Jackson, was unaware of the pending litigation (App. Cert. 7). From this, one infers that All American's auditors (and thus All American itself) were unaware of the pending litigation since they did not contact Jackson to request an evaluation of the pending claim, as is standard practice in the sale of any business;

4. The first time Schilling discussed the unfair labor practice with any All American officer was one week prior to the hearing held on February 3, 1970, when he spoke with Mr. Davis, attorney of All American in Providence, Rhode Island, and then later, on the morning of the hearing, spoke with Mr. Haley, President and Chief Executive Officer of All American, officed in Springfield, Ohio. Schilling further testified that Haley had no knowledge of the pending proceedings until that telephone conversation (App. 170-172).

With this in mind, the Board stoutly contends that it has discharged its burden, stating: "There is ample evidentiary support for the Board's finding" (Bd. Br. 11) and that "substantial evidence supports the Board's

finding" (Bd. Br. 18). But each time it makes this broad assertion, it points only to the following things:

1. That it discredited the testimony of Schilling and Crofoot;

2. That Schilling was retained by All American after the sale and *he* had pre-sale knowledge; and

3. That Petitioners failed to call officers of All American, from Providence, Rhode Island, or Springfield, Ohio, to testify on the point.

We will take up these points, *seriatim*.

The Board's discreditation of Crofoot and Schilling is based primarily upon their *post-sale* execution of certain documents tending to indicate that Golden State was still doing business as the Pepsi-Cola Bottling Company of Sacramento.[7] Based on this conduct, the Board concludes that they were attempting to conceal the fact of sale from it.

What the Board does not tell us, however, is just *why* Schilling or Crofoot would *want* to hide the fact of the sale. Certainly they were not attempting to avoid the impact of the Board's order, for promptly following the entry of the Court's final decision enforcing it, an unequivocal offer of reinstatement was made to Baker, the requisite notices were posted and the Order otherwise substantially complied with, except for the items here disputed. Furthermore, when Golden State's labor counsel first became aware of the sale, it was *he* who promptly brought that fact to the attention of the Board

[7]The Board itself committed this error before the Court below in the very brief in which it argued that the sinister motives of Crofoot and Schilling were demonstrated by their same error. The Board repeated this error in two other instances (App. 36; App. Cert. 1).

[Tr. 285-286], a fact which the Board studiously omits, for some reason, to acknowledge. With all this in mind, it is much more rational to assume that the execution of these documents in this manner occurred for the reason given, *i.e.*, because they were tendered to Schilling and Crofoot by the Board and by their own counsel and they simply followed the instructions of these presumably more knowledgeable persons.

The other "evidence" on which the discreditation is based, consists of the alleged contradictions in Schilling's and Crofoot's testimony which, as pointed out in Petitioners' Opening Brief (Br. 44) were not in fact or substance contradictory—as the Board's own excerpts themselves reveal.

But even giving the Board the benefit of every argument it raises in this context and permitting full play to all the sinister implications it tries to breathe into these perfectly straightforward circumstances, the most that is accomplished is a cancellation of their testimony on the issue of knowledge. The slate is wiped clean, and the General Counsel is back on square one, still charged with adducing evidence sufficient to carry his burden, which not even the Board disputes was his to carry.

Since mere disbelief of a witness cannot create evidence of a fact, the Board has to search elsewhere to fill this void.

It next resorts to the technical fiction of imputation, arguing that All American's post-sale retainer of Schilling may be utilized to impute pre-sale knowledge to it. This device was challenged by Petitioners in their Opening Brief. The Board has failed to produce any authority in support of its position. The cases it has cited

(Bd.Br. 20, fn. 16) are so totally inappropriate we infer these must have been cited in error.

Any application of this fiction would remove the single factor pointed to as a means by which the successor can avoid the harsh consequences of the deprivation of due process inherent in the *Perma Vinyl* doctrine. The *Perma Vinyl* doctrine as so modified would afford no reasonable opportunity for the successor to adjust the purchase price to reflect liability arising from the unfair labor practices. As applied in this instance, All American would be liable despite the fact that it did not have the "benefit" of Schilling's knowledge until *after* the sale had been completed when Schilling commenced his employment. The net effect of the application of this doctrine is to remove with the left hand concessions previously given with the right.

Lastly we come to the contention which is equally sophistical and equally bereft of common sense, namely that the General Counsel's failure to fulfill *his* burden can somehow be taxed to Petitioners and made the basis of an inference on the issue adverse to *them*. The Board suggests that because *Petitioners* failed to call officers of All American on the issue of knowledge, it must be inferred that they would have testified adversely to Petitioners on the subject.

In considering this point, it should be borne in mind, once again, that this is an issue as to which the Board had the burden.

The possible witnesses on the issue were: Schilling, Crofoot and the officers of All American who participated in the negotiations. All of these could have been called by the General Counsel. He chose, however, to call only two of them, Schilling and Crofoot. These testified positively that no knowledge existed.

To any rational mind the question immediately poses itself: Why, then did the *General Counsel* not call the officers of All American? The question almost answers itself: if he did not, it could only be for the reason that he knew or assumed that such testimony would not benefit his case; that is, that they would corroborate what Schilling and Crofoot had already testified to on the issue.

If anybody is to be taxed with a failure to call these witnesses, *it should be the party who had the burden on the issue*. For the Board, then, to attempt to tax *Petitioners* with this failure is the height of incongruity.[8]

The cases cited by the Board only underscore what we have urged above. *NLRB v. Dorn's Transportation Co.*, 405 F. 2d 706, 713 (2nd Cir. 1969), was a wrongful discharge case in which, consistent with what we have said, the inference was raised against the party having the burden. The General Counsel having presented a *prima facie* case, the burden of proof, under the authority of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), shifted to the employer. Its failure to call the one person who could rebut the General Counsel's evidence was, quite properly made the subject of an adverse inference. In the case at bar, the burden was and remained upon the Board.

Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1938), also cited by the Board, is a similar case

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[8]The full dimension of this incongruity becomes more apparent if one but considers, for a moment, what the Board's view would have been if officers of All American *had* been called by Petitioners and *had* corroborated Schilling and Crofoot on the issue. The testimony of the latter two was contemptuously dismissed with the observation that it was a mere "self-serving denial" (Bd. Br. 18). Why then would it have treated testimony by officers of All American any differently?

in which the Court upheld an adverse inference based upon the failure to call knowlegeable persons, but only after explaining that the burden of going forward had shifted to the defendants with the introduction of certain evidence. Once again, the inference arising from the failure to call witnesses was raised against the party having the burden.

Finally, the Board relies upon *NLRB v. Wallick*, 198 F. 2d 477 (3rd Cir. 1952). In that case, an unfavorable inference was drawn against a defendant because of his failure to produce certain evidence in support of an *affirmative defense* which the defendant was charged with proving. Once again, the case emphasizes, as Petitioners have urged, that the inference can be raised only as against the party having the burden.

Nothing appearing in any case cited by the Board or, indeed, in any argument put forward by it, suggests that the Board has, in any way, been relieved of the burden imposed upon it by *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), to prove its case by a preponderance of substantial, credible evidence. Manifestly, it cannot meet this burden by seeking to impose upon Petitioners the consequences of its own failure to produce and examine all available witnesses.

On the record before us, no fair-minded person can discern any evidence whatever that All American had any pre-sale knowledge of unfair labor practices on the part of Golden State. The available evidence, indeed, points the other way.

IV.

The Board's Brief Fails to Set Forth Any Authority to Support the Remedial Aspects of Its Order.

A. All Liability Ceased to Accrue as of October 1, 1964.

The Board attempts to sidestep the consequences of its own critical finding that on October 1, 1964, Baker would have voluntarily terminated his employment relationship and commenced his own business as a distributor. He would, thus, no longer have been entitled to the pay and benefits of an employee but, would, rather (hopefully), have derived profits from his new business.

In their Opening Brief, Petitioners pointed out that, under the rule of *Mastro Plastics Corp.*, 136 NLRB No. 119, 50 LRRM 1006 (1963), their liability for reinstatement and for back pay accruals ceased to run from the time Baker would voluntarily have terminated his employment with Golden State. The Board attempts to parry the thrust of *Mastro Plastics* by discussing cases involving interim earnings derived from self-employment by discriminatees prior to reinstatement. These are beside the point. Such interim earnings, whether derived from self-employment or employment by another, would have no bearing whatever on the offending employer's basic remedial obligation, only in mitigation of back-pay liability.

Petitioners' argument was focused not upon interim earnings or the sources from which they were derived, but upon the Board's finding that even if Baker had not been the subject of unlawful discrimination by his employer, Golden State, he would, voluntarily and definitively, have *terminated his employment* with that employer to go into business for himself on 1 October,

1964. It is this voluntary termination of employment which invokes the rule of *Mastro Plastics* and terminates further accruals of remedial liability. The Board's Brief fails to respond to this argument.

B. The Board Was Without Authority to Order the Character of Remedial Action Purportedly Enjoined by It Upon Petitioners.

In their Opening Brief, Petitioners argued that the Board exceeded its power, in the remedial aspects of its Order, by purporting to require Petitioners,

(1) To "reinstate" Baker into a nonemployment situation, by establishing him in an independent business (*i.e.*, by offering to enter into a distributorship contract with him);

(2) To pay to Baker, ostensibly as "back pay," consequential damages based upon net profits which Baker allegedly would have earned in business for himself as an independent distributor.

Petitioners argued extensively in support of these contentions, and we do not intend to burden the Court by repeating those arguments here. It is, however, pertinent to note that the Board and the General Counsel have, throughout, taken the position that it is irrelevant to the issue whether the distributors were employees of Golden State or independent contractors. Petitioners have, throughout, contended that such distributors were independent contractors, and the Board's Trial Examiner so found.

The General Counsel's position on the issue is understandable, for to take a position, or to dispute the contention of Petitioners would, in effect, be to concede that the distinction did indeed make a difference.

In its Brief, the Board reveals the weakness inherent in its position and noticeably fails to adduce any convincing authority in support of its views which, be it noted, are of first impression. Rather, it resorts to misleading and inept terminology by arguing that Baker, as a distributor, "would still have been working for Golden State and its successor, All American" (Bd. Br. 39), that he would have received "earnings" as a distributor rather than profits (Bd. Br. 39) and that the monetary award ordered paid by Petitioners was "gross back *pay*" (Bd. Br. 40).

What the Board's argument adds up to, without saying so, is simply this: the distributors were really still employees of Petitioners.

In other words, the Board, once again, has avoided coming to grips with the direct thrust of Petitioners' arguments. Instead it is, in effect, arguing that the distributors were not really independent contractors after all since they continued to "work for" Petitioners and were subject to their control.

Once again, the Board has attempted to sidestep not only the heart of the issue but also the consequences of its own clear finding in this respect. We believe this tactic merely corroborates the soundness of Petitioners' position.

Conclusion.

For the foregoing reasons, together with those contained in Petitioners' Opening Brief, Petitioners request that this Court reverse the opinion and judgment of the court below and remand this matter to such court with instructions to enter judgment against Petitioner Golden State Bottling Company for back pay Baker would have earned as a driver-salesman in Golden State's employ

from the day he was wrongfully terminated through October 1, 1964. In the alternative, if this Court is not disposed to accept Petitioners' argument in regard to Baker's voluntary termination of employment, Golden State should be ordered to pay to Baker back pay he would have earned as a driver-salesman in Golden State's employ from the date of his wrongful termination until the date of sale of the bottling company by Golden State, January 31, 1968. In either instance, enforcement as against All American should be denied.

Respectfully submitted,

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GOLDEN STATE BOTTLING CO., INC., FORMERLY PEPSI-COLA BOTTLING CO. OF SACRAMENTO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-702. Argued October 11, 1973—
Decided December 5, 1973

Petitioner All American Beverages, Inc. (All American), purchased the soft drink bottling and distribution business of petitioner Golden State Bottling Co. (Golden State) after the National Labor Relations Board (NLRB) had ordered Golden State, "its officers, agents, successors, and assigns" to reinstate with back pay a driver-salesman whose discharge by Golden State was found to have been an unfair labor practice. In a subsequent back-pay specification proceeding to which both firms were parties, upon finding that All American after the acquisition continued the business without interruption or substantial change in operations, employee complement, or supervisory personnel, and that hence All American, having acquired the business with knowledge of the outstanding NLRB order, was a "successor" for purposes of the National Labor Relations Act (NLRA) liable for the reinstatement of the driver-salesman with back pay, the NLRB ordered All American to reinstate him and both firms jointly or severally to pay him a specified sum of back pay. The Court of Appeals enforced the order. *Held:*

1. The Court of Appeals did not err in determining that, on the record as a whole, substantial evidence supported the NLRB's finding that All American purchased the business with knowledge of the unfair labor practice litigation, since it cannot be said on the basis of the record that the Court of Appeals "misapprehended or grossly misapplied" the standard of review. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474. Pp. 172–174.

2. The issuance of a reinstatement and back-pay order against a bona fide successor that did not itself commit the unfair labor practice does not exceed the NLRB's remedial powers under § 10 (c) of the NLRA, since such powers include broad discretion to fashion and issue such an order in order to achieve the ends and effectuate the policies of the Act. Pp. 175–177.

3. Fed. Rule Civ. Proc. 65 (d), which provides that injunctions and restraining orders shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order, does not bar judicial enforcement of the NLRB order running to All American, since a bona fide successor, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65 (d). Pp. 177–181.

4. The NLRB properly exercised its discretion in issuing the order against All American by striking an equitable balance among the conflicting legitimate interests of the bona fide successor, the public, and the affected employee for purposes of effectuating the national labor policies of avoiding labor strife, preventing a deterrent effect on the exercise of rights guaranteed employees by § 7 of the NLRA, and protecting the victimized employee, such policies being achieved at a relatively minimal cost to the bona fide successor. Pp. 181–185.

5. The NLRB did not err in ordering both firms jointly or severally to pay the driver-salesman a specified sum of back pay, since an offending predecessor-employer should at least be required to make whole the dischargee for any loss of pay suffered by reason of the discharge until such time as he secures substantially equivalent employment, since joint and several liability will more fully insure that the employee is fully recompensed by protecting him against, *e. g.*, the successor's insolvency, and since the possibility that the successor will unjustifiably delay reinstatement to the predecessor's prejudice can be met by a protective provision in the contract of sale. Pp. 186–187.

6. The fact that the driver-salesman, but for his discharge as an ordinary employee would, under Golden State's policy, have become a distributor about a year later and as an independent contractor would have been excluded from NLRA coverage, did not preclude the NLRB from including in the gross back pay computation the dischargee's putative earnings as a distributor, since a reinstatement and back-pay order is aimed at restoring the status quo that would have obtained but for the employer's unfair labor practice. Pp. 187–189.

467 F. 2d 164, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Morton B. Jackson argued the cause for petitioners. With him on the briefs was *Gilford G. Rowland.*

Norton J. Come argued the cause for respondent. With him on the brief were *Solicitor General Bork, Allan A. Tuttle, Peter G. Nash, John S. Irving, Patrick Hardin,* and *William H. DuRoss III.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The principal question for decision in this case is whether the bona fide purchaser of a business, who acquires and continues the business with knowledge that his predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the National Labor Relations Board to reinstate the employee with back pay.

Petitioners are Golden State Bottling Co., Inc. (Golden State), and All American Beverages, Inc. (All American). All American bought Golden State's soft drink bottling and distribution business after the National Labor Relations Board had ordered Golden State, "its officers, agents, successors, and assigns" to reinstate with back pay a driver-salesman, Kenneth L. Baker, whose discharge by Golden State was found by the Board to have been an unfair labor practice.[1] In a subsequent back-

[1] On June 10, 1964, the Board found that Golden State violated §§ 8 (a) (3) and (1) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a) (3) and (1), by discharging Baker, on August 16, 1963, because of union activities, and ordered Baker's reinstatement with back pay. 147 N. L. R. B. 410. On December 2, 1965, the Court of Appeals for the Ninth Circuit enforced the Board's order with respect to Baker. 353 F. 2d 667. Due to a delay in the Court of Appeals' disposition of the Board's petition for rehearing on a portion of the court's decision unrelated to Baker, a final decree was not entered until November 27, 1968, see 401 F. 2d 454.

pay specification proceeding to which both Golden State and All American were parties, see 29 CFR §§ 102.52–102.59, the Board found that All American continued after the acquisition to carry on the business without interruption or substantial changes in method of operation, employee complement, or supervisory personnel. In that circumstance, although All American was a bona fide purchaser of the business, unconnected with Golden State, the Board found that All American, having acquired the business with knowledge of the outstanding Board order, was a "successor" for purposes of the National Labor Relations Act and liable for the reinstatement of Baker with back pay under the principles announced in *Perma Vinyl Corp.*, 164 N. L. R. B. 968 (1967), enforced *sub nom. United States Pipe & Foundry Co.* v. *NLRB*, 398 F. 2d 544 (CA5 1968).[2] The Board therefore ordered that

[2] *Perma Vinyl* states the principles and their rationale as follows:

"To further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

"In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all

All American reinstate Baker and that Golden State and All American jointly or severally pay Baker a specified sum of net back pay. 187 N. L. R. B. 1017 (1971). The Court of Appeals for the Ninth Circuit, one judge dissenting, enforced the order, 467 F. 2d 164 (1972). We granted certiorari, 410 U. S. 953 (1973). We affirm.

I

There is a threshold question of whether the Court of Appeals erred in determining that the evidence "offered substantial support for the Board's finding that All American purchased [the bottling business] with knowledge of the unfair labor practice litigation." 467 F. 2d, at 165. We address that question mindful of the congressionally imposed limitation on this Court's review of the Court of Appeals' determination:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance *when the standard appears to have been misapprehended or grossly misapplied.*" *Universal Camera Corp.* v.

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employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." 164 N. L. R. B. 968, 969 (footnotes omitted).

NLRB, 340 U. S. 474, 491 (1951). (Emphasis added.)

Thus limited, we cannot find fault with the Court of Appeals' conclusion that, on the record as a whole, substantial evidence supported the Board's finding that All American purchased the business with knowledge of the unfair labor practice litigation. Eugene Schilling, Golden State's secretary and manager of the bottling business, who had discharged Baker and then closely followed the progress of the litigation, continued with the enterprise under All American's ownership with the title of general manager and "president." Indeed, All American's purchase of the business was conditioned on Schilling's staying on in a managerial capacity; the sales contract expressly stipulated that Schilling "shall have agreed to be employed by [All American] for a period of one year after the Closing Date as General Manager . . . ." Schilling participated on at least one occasion with Golden State's president, Edwin J. Crofoot, in the sale negotiations. Even if strict agency principles would not impute Schilling's knowledge to All American until Schilling actually entered its employ, see Restatement (Second) of Agency § 9 (3) (1958); *Thomas Engine Corp.*, 179 N. L. R. B. 1029, 1042 (1970), enforced *sub nom. UAW* v. *NLRB*, 442 F. 2d 1180 (CA9 1971), the Court of Appeals cannot be said to have "misapprehended or grossly misapplied" the governing standard in appraising this evidence as sufficiently substantial to support an inference that Schilling informed his prospective employer of the litigation before completion of the sale. It is true that both Schilling and Crofoot testified at the hearing in the specification proceeding that they had not informed All American of the litigation before the sale was completed. But the trial examiner refused to credit their testimony in light of documentary evidence from which he inferred that the Golden State officials had

attempted to conceal the sale from the Board, 187 N. L. R. B., at 1021. The examiner also refused to credit Crofoot's testimony that, while All American expressly asked him whether any litigation was pending, he did not mention the unfair labor practice case because he had forgotten it, although admitting that he had authorized payment of substantial fees in connection with it. *Ibid.* Finally, the examiner inferred from the unexplained failure of All American to produce its negotiators as witnesses that their testimony would not have supported All American's disclaimer of knowledge.[3]

On this state of the record, there is no justification for this Court's intervention, since *Universal Camera* precludes us from substituting our judgment for that of the Court of Appeals. "This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ." *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503 (1951); see *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 548 (1972).

II

The Board has pursued an uneven course in its treatment of a bona fide successor's liability to remedy the unfair labor practices of its predecessor. In 1944 the Board determined that liability would not be imposed on a bona fide successor, *South Carolina Granite Co.*, 58 N. L. R. B. 1448, enforced *sub nom. NLRB* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (CA4 1945). In 1947 the Board abandoned that view and determined that joint and several remedial responsibility would be imposed upon a bona fide successor who had knowledge of the seller's unfair lal or practice at the time of the purchase, *Alex-*

[3] See, *e. g.*, *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226 (1939); *NLRB* v. *Dorn's Transp. Co., Inc.*, 405 F. 2d 706, 713 (CA2 1969).

ander Milburn Co., 78 N. L. R. B. 747. When, however, two Courts of Appeals refused to enforce remedial orders against bona fide successors, *NLRB* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (CA10 1953), and *NLRB* v. *Lunder Shoe Corp.*, 211 F. 2d 284 (CA1 1954), the Board, in 1954, re-examined and overruled *Alexander Milburn Co.*, declaring, in *Symns Grocer Co.*, 109 N. L. R. B. 346, that "[n]o provision of the [National Labor Relations] Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein." *Id.*, at 348. Finally, in 1967, in yet another turnabout, the Board overruled *Symns Grocer Co.* in *Perma Vinyl, supra*, and announced that, in circumstances there defined, see n. 2, *supra*, remedial orders would be imposed upon bona fide successors for the unfair labor practices of their predecessors.

We must consider at the outset whether the issuance of a reinstatement and back-pay order against a bona fide successor exceeds the Board's remedial powers under § 10 (c) of the Act, 29 U. S. C. § 160 (c). Section 10 (c), in pertinent part, provides:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that *any person named in the complaint has engaged in . . . any such unfair labor practice*, then the Board . . . shall issue and cause to be served on such person an order requiring *such person* to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act* . . . ." (Emphasis added.)

The Board's restrictive view in *Symns Grocer Co.* of its remedial powers derived from a limitation perceived to inhere in the words "any *person* named in the complaint has engaged in . . . any such unfair labor practice"

(emphasis added). These words were regarded as precluding authority to issue remedial orders against persons, like bona fide successors, who had not perpetrated the unfair labor practice. In *Perma Vinyl*, however, the Board found a broader authority in the words of the section authorizing the Board "to take such affirmative action . . . as will effectuate the policies of this Act." These words were construed as granting "broad administrative power . . . to frame such remedial orders . . . not, of course, restricted to requiring remedial action by the offending employer alone," 164 N. L. R. B., at 969, as were necessary to further the public interest subserved by the Act. See *NLRB* v. *Colten*, 105 F. 2d 179 (CA6 1939).

We agree that the Board's remedial powers under § 10 (c) include broad discretion to fashion and issue the order before us as relief adequate to achieve the ends, and effectuate the policies, of the Act. Early on, this Court recognized that § 10 (c) does not limit the Board's remedial powers to the actual perpetrator of an unfair labor practice and thereby prevent the Board from issuing orders binding a successor who did not himself commit the unlawful act. We have said that a Board order that, as in this case, runs to the "officers, agents, successors, and assigns" of an offending employer, may be applied not only to a new employer who is "merely a disguised continuance of the old employer," *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, 106 (1942), but also " 'in appropriate circumstances . . . [to] those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons.*' " *Regal Knitwear Co.* v. *NLRB*, 324 U. S. 9, 14 (1945) (emphasis added); see also *NLRB* v. *Ozark Hardwood Co.*, 282 F. 2d 1, 5 (CA8 1960). If the words "person named in the complaint has engaged in . . . any . . . unfair labor practice" in § 10 (c) do not restrict Board authority to prevent

orders running to the offending employer's successors and assigns who have acquired the business as a means of evading the Board order, we do not see how those words may be read to bar the Board from issuing reinstatement and back-pay orders against bona fide successors when the Board has properly found such orders to be necessary to protect the public interest in effectuating the policies of the Act. The Board's orders run to the evader and the bona fide purchaser, not because the act of evasion or the bona fide purchase is an unfair labor practice, but because the Board is obligated to effectuate the policies of the Act. Construing § 10 (c) thus to grant the Board remedial power to issue such orders results in a reading of the section, as it should be read, in the light of "'the provisions of the whole law, and . . . its object and policy.'" *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956); see *NLRB* v. *Lion Oil Co.*, 352 U. S. 282, 288 (1957).

It is also argued, however, that Fed. Rule Civ. Proc. 65 (d), in any event, is a bar to judicial enforcement of a Board order requiring that a bona fide successor reinstate with back pay an employee illegally discharged by its predecessor. We disagree.[4] Rule 65 (d) provides that

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[4] A short answer to petitioners' argument might appear to be that, because the Board's supplemental order to All American required only reinstatement and back pay, and not that All American cease and desist from future unlawful activity, no injunctive relief was ordered, and therefore Rule 65 (d) need not be considered. But we have previously found Rule 65 (d) applicable to mandatory injunctions and have noted that the courts of appeals have applied it "not only to prohibitory injunctions but to enforcement orders and affirmative decrees as well." *Local 1291, ILA* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64, 75 and n. 14 (1967); see generally Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1061–1063 (1965).

In not requiring the bona fide purchaser to cease and desist, the Board followed prior practice. See *Thomas Engine Corp.*, 179

injunctions and restraining orders shall be "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." See generally O. Fiss, Injunctions 691–700 (1972). We reject petitioners' contention that *Regal Knitwear Co.* v. *NLRB*, *supra*, at 14, supports the argument that this Rule is a bar to judicial authority to enforce Board orders against bona fide successors. In *Regal Knitwear*, the Court refused the offending employer's application to strike the phrase "successors and assigns" from the Board's order, citing *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671 (1944), which involved an injunction against violation of the Fair Labor Standards Act. *Regal Knitwear* treated a Board cease-and-desist order as "somewhat analogous" to such an injunction, and stated:

> "'Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been

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N. L. R. B. 1029 and n. 4 (1970), enforced *sub nom. UAW* v. *NLRB*, 442 F. 2d 1180 (CA9 1971). This approach seems consistent with the fact that the successor's obligations do not arise out of its own unfair labor practices. The Board's practice after its earlier decision in *Alexander Milburn Co.*, 78 N. L. R. B. 747 (1947), had been to order the bona fide purchaser to cease and desist. This may account for decisions of the courts of appeals, *e. g.*, *NLRB* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234, 236 (CA10 1953), opposing the Board's position in *Alexander Milburn*, which eventually led to the Board's overruling of that decision in *Symns Grocer Co.*, 109 N. L. R. B. 346 (1954). See DuRoss, Protecting Employee Remedial Rights Under the Perma Vinyl Doctrine, 39 Geo. Wash. L. Rev. 1063, 1089 (1971).

transferred, whether as a means of evading the judgment or for other reasons.' . . .

"We do not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order. . . . [W]hether one brings himself in contempt as a 'successor or assign' depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order." 324 U. S., at 14–15.

Plainly then, *Regal Knitwear* recognizes that Rule 65 (d) is not a bar to enforcement of all Board orders running to successors or assigns not themselves offending employers. The Court simply left open the question of whether the Rule precludes the enforcement of remedial orders running to a successor who is a bona fide purchaser. We answer that question today by holding that the Rule is not a bar to judicial enforcement of the Board order entered against the bona fide successor in this case.

Rule 65 (d) "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear*, 324 U. S., at 14. Persons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge. Restatement of Judgments § 89, and comment *c* (1942); see 1 J. Story, Equity Jurisprudence § 536 (14th ed. 1918). This principle has not been limited to *in rem* or *quasi in rem* proceedings. Restatement of Judgments, *supra*, § 89, comment *d.*; see *ICC* v. *Western N. Y. & P. R. Co.*, 82 F. 192, 194 (WD Pa. 1897). We apply that principle here in order to effectuate the public policies of the Act. "Courts of equity may, and fre-

quently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 552 (1937); see *Walling* v. *James V. Reuter, Inc.*, 321 U. S., at 674–675. We hold that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65 (d). Cf. *United States* v. *Hall*, 472 F. 2d 261, 266–267 (CA5 1972); *Rivera* v. *Lawton*, 35 F. 2d 823 (CA1 1929); *United States* v. *Dean Rubber Mfg. Co.*, 71 F. Supp. 96 (WD Mo. 1946); *United Gilpin Corp.* v. *Wilmore*, 100 Colo. 453, 68 P. 2d 34 (1937); 7 J. Moore, Federal Practice ¶ 65.13, p. 109 and n. 1 (2d ed. 1973).

Our holding in no way contravenes the policy underlying Rule 65 (d), of not having "order[s] or injunction[s] so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear*, 324 U. S., at 13; see *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832 (CA2 1930). The tie between the offending employer and the bona fide purchaser of the business, supplied by a Board finding of a continuing business enterprise, establishes the requisite relationship of dependence. Moreover, procedures were announced in *Perma Vinyl* which provide the necessary procedural safeguards. There will be no adjudication of liability against a bona fide successor "without affording [it] a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices. The successor [will] also be entitled, of course, to be heard against the enforcement of any order issued against it." 164 N. L. R. B., at 969.

In this case, All American has no complaint that it was denied due notice and a fair hearing. It was made a party to the supplemental back-pay specification proceeding, given notice of the hearing, and afforded full opportunity, with the assistance of counsel, to contest the question of its successorship for purposes of the Act and its knowledge of the pendency of the unfair labor practice litigation at the time of purchase.

We now turn to the question whether the Board properly exercised its discretion in issuing the order against All American. The Board's decisional process in the *Perma Vinyl* line of cases has involved striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee. What we said of the Board's decisional process in another context is pertinent here:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Teamsters Local 449*, 353 U. S. 87, 96 (1957).

The Board's *Perma Vinyl* principles introduced into the balancing process an emphasis upon protection for the victimized employee:

> "Especially in need of help, it seems to us, are the employee victims of unfair labor practices who, because of their unlawful discharge, are now without meaningful remedy when title to the employing business operation changes hands." 164 N. L. R. B., at 969.

The Board found support for this policy, and we think

properly, in the Court's observation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 549 (1964):

> "Employees . . . ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."

In *Wiley* a labor union sued under § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, to compel a corporate employer to arbitrate under a collective-bargaining agreement. The agreement originally had been entered into with another corporation which had subsequently merged with Wiley for genuine business reasons. We held that the disappearance of the contracting corporation by merger did not necessarily terminate the rights of employees guaranteed by the agreement and that the successor employer could be compelled to arbitrate, so long as there was a "substantial continuity of identity in the business enterprise," evidenced there by the wholesale transfer of the predecessor's employees to the successor. 376 U. S., at 551.[5]

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[5] We recognize that, unlike the situation in *Wiley* where state law provided some support for holding the successor by consolidation liable, see 376 U. S., at 547–548, the general rule of corporate liability is that, when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the

Later, in *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272 (1972), the Court extended the *Wiley* principle to a case where the original employer, a plant protection company, was displaced by a different company. The new company hired a majority of the employees of the old company. The Court held that the new company had been properly ordered to bargain with the bargaining representative which had been certified to the old company, since the bargaining unit remained essentially unchanged. It was also held, however, that the new employer was not bound by the collective-bargaining agreement agreed to by the union and the predecessor employer, inasmuch as § 8 (d) of the Act, as well as the legislative history of the labor laws, reflected a policy against compelling a party to agree to substantive contractual obligations. 406 U. S., at 281–

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obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability. See 15 W. Fletcher, Cyclopedia Corporations §§ 7122–7123 (1961 rev. ed.); *Kloberdanz* v. *Joy Mfg. Co.*, 288 F. Supp. 817 (Colo. 1968). The perimeters of the labor-law doctrine of successorship, however, have not been so narrowly confined. See 15 W. Fletcher, *supra*, § 7122, p. 196 (Supp. 1972); Slicker, A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051, 1062–1063 (1973). Successorship has been found "where the new employer purchases a part or all of the assets of the predecessor employer, *NLRB* v. *Interstate 65 Corp.*, 453 F. 2d 269 (CA6 1971); [and] where the entire business is purchased by the new employer, *NLRB* v. *McFarland*, 306 F. 2d 219 (CA10 1962) . . . ." *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272, 306 (1972) (opinion of REHNQUIST, J.); see *id.*, at 291 (opinion of the Court). The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the "employing industry," the public policies underlying the doctrine will be served by its broad application. Cf. *NLRB* v. *Colten*, 105 F. 2d 179, 183 (CA6 1939).

284, 291. Similarly, the Court refused to bind the union, since it might have made bargaining concessions with the previous employer which it would not necessarily agree to in negotiations with the successor. *Id.*, at 288.

We in no way qualify the *Burns* holdings in concluding that the Board's order against All American strikes an equitable balance.[6] When a new employer, such as All American, has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies. To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action. Similarly, if the employees identify the new employer's labor policies with those of the predecessor but do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities. Moreover, the Board's experience may reasonably lead it to believe that em-

[6] A purchasing company cannot be obligated to carry out under § 10 (c) every outstanding and unsatisfied order of the Board. For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees, see *NLRB* v. *Burns International Security Services, Inc.*, *supra*, at 280 n. 5, the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the predecessor nor by any order tied to the continuance of the bargaining agent in the unit involved. *Id.*, at 280–281.

ployers intent on suppressing union activity may select for discharge those employees most actively engaged in union affairs, so that a failure to reinstate may result in a leadership vacuum in the bargaining unit. Cf. *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 193 (1941). Further, unlike *Burns*, where an important labor policy opposed saddling the successor employer with the obligations of the collective-bargaining agreement, there is no underlying congressional policy here militating against the imposition of liability.

Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by § 7 of the Act, 29 U. S. C. § 157, and protection for the victimized employee—all important policies subserved by the National Labor Relations Act, see 29 U. S. C. § 141—are achieved at a relatively minimal cost to the bona fide successor. Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." *Perma Vinyl Corp.*, 164 N. L. R. B., at 969. If the reinstated employee does not effectively perform, he may, of course, be discharged for cause. See 29 U. S. C. § 160 (c).[7]

[7] The only court of appeals panel which has considered the *Perma Vinyl* decision, other than the Fifth Circuit in enforcing the Board's order in that case, *United States Pipe & Foundry Co.* v. *NLRB*, 398 F. 2d 544, and the Ninth Circuit in the decision under review, 467 F. 2d 164, has expressed its approval. *UAW* v. *NLRB*, 442 F. 2d, at 1183 (Tuttle, J.). Commentators have generally concurred. See DuRoss, *supra*, n. 4; Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U. L. Rev. 735 (1969); Comment, Successor Employer's Obligation to Remedy Unfair Labor Practices, 68

III

Golden State attacked in the Court of Appeals the provision of the Board's order directing that it and All American jointly or severally pay Baker a specified sum of net back pay. Golden State contends that, at most, it "should be ordered to pay to Baker back pay he would have earned as a driver-salesman in Golden State's employ from the date of this wrongful termination until the date of sale of the bottling company by Golden State, January 31, 1968." Brief for Petitioners 60.[8] The Court of Appeals declined to consider this argument because Golden State had agreed orally and in the contract of sale to indemnify All American for any back pay paid Baker by All American and therefore was "liable for such wages by virtue of its agreement, whether or not it would also be liable absent that agreement." 467 F. 2d, at 166. But Golden State's contractual obligation may be subject to contractual defenses and for that reason may not in fact be the equivalent of the liability imposed upon Golden State by the order. We shall therefore decide Golden State's challenge to the validity of the imposition of joint and several liability upon Golden State. We find no merit in the challenge.

The Board justified such provisions in *Perma Vinyl* in these words: "With respect to the offending employer himself, it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all

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Col. L. Rev. 1602 (1968); Comment, 42 N. Y. U. L. Rev. 1202 (1967); Comment, 47 N. C. L. Rev. 459 (1969); Comment, 41 Temp. L. Q. 156 (1967); Comment, 13 Vill. L. Rev. 232 (1967).

[8] Although the original order of the Board required Golden State to reinstate Baker, 147 N. L. R. B., at 412, the Board concedes that the sale to All American terminated Golden State's reinstatement obligation. See *NLRB* v. *New Madrid Mfg. Co.*, 215 F. 2d 908 (CA8 1954).

responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the dischargees for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer." 164 N. L. R. B., at 970. In addition, joint and several liability will more fully insure that the employee is fully recompensed by protecting him, *e. g.*, against the insolvency of the successor. The possibility that the successor will unjustifiably delay reinstatement to the predecessor's prejudice can be met by a protective provision in the contract of sale. We cannot say that the Board has erred in thus "striking [the] balance to effectuate national labor policy . . . ." *NLRB* v. *Teamsters Local 449*, 353 U. S., at 96.[9]

IV

When Baker was discharged on August 16, 1963, he was Golden State's leading driver-salesman. On October 1, 1964, Golden State began converting its top driver-salesmen to distributors, or independent contractors, who realized net profits, after the deduction of their operating expenses, from the purchase of products from Golden State and the resale to customers. The Board found that Baker would have become a distributor on October 1, 1964, but for his discharge on August 16, 1963. The Board therefore computed Baker's gross back pay

[9] Golden State's reliance on *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965), is misplaced. In *Darlington*, it was held that an employer's liquidation of its entire business, even if motivated by antiunion animus, would not be an unfair labor practice. *Id.*, at 273–274. But Golden State committed an unfair labor practice over four years prior to the sale of the bottling business to All American, and in that circumstance, the sale could not terminate its continuing liability for back pay.

subsequent to October 1, 1964, on the basis of what he would have earned as a distributor after that date.

Petitioners argue that the change on October 1, 1964, from driver-salesman to distributor ended their liability to Baker on that date because distributors are "independent contractors" excluded from coverage of the Act by 29 U. S. C. § 152 (3). The Court of Appeals rejected that contention, stating:

> "However, it is undisputed that when Baker was discriminatorily discharged he was an ordinary employee. The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. NLRB v. Bell Aircraft Corp., 206 F. 2d 235, 236–237 (2d Cir. 1953)." 467 F. 2d, at 166.

We agree with the Court of Appeals and add only the observation that its conclusion is buttressed by the consideration that an order requiring reinstatement and back pay is aimed at "restoring the economic status quo that would have obtained but for the company's wrongful refusal to reinstate . . . ." *NLRB* v. *J. H. Rutter-Rex Mfg. Co., Inc.*, 396 U. S. 258, 263 (1969).[10] The Board treats net profits of the employee who goes into business on his own as interim earnings for the purpose of computing net back pay. *Mastro Plastics Corp.*, 136 N. L. R. B. 1342, 1350 (1962), enforced in part, *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170 (CA2 1965). In the effort to restore the economic status quo that would have

[10] It is apparent that had Golden State already reinstated Baker with back pay before the sale of its business, and thereby fully complied with the Board's order, All American would have had no more obligation to employ him in the continuing business than it had to employ any of Golden State's other employees. See n. 6, *supra*.

obtained but for Baker's wrongful discharge, it was also proper to compute what he would have earned after October 1, 1964, on the basis of his net profits as a distributor. Cf. *NLRB* v. *Rice Lake Creamery Co.*, 124 U. S. App. D. C. 355, 358, 365 F. 2d 888, 891 (1966); *NLRB* v. *Mooney Aircraft, Inc.*, 375 F. 2d 402 (CA5 1967).

Affirmed.